

**U.S. Bankruptcy Court  
Eastern District of Michigan (Detroit)  
Bankruptcy Petition #: 13-53846-swr**

*Date filed:* 07/18/2013

*Assigned to:* Judge Steven W. Rhodes  
Chapter 9  
Voluntary  
No asset

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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
**TRANSCRIPT ORDER FORM**

111 First Street  
Bay City, MI 48708

211 W. Fort Street  
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**Case/Debtor Name:**

Case Number: 13-53846

Chapter: 9

Hearing Judge Hon. Steven Rhodes

☒ Bankruptcy ☐ Adversary

☐ Appeal Appeal No: \_\_\_\_\_

**Hearing Information** (A separate form must be completed for each hearing date requested.)

Date of Hearing: 10/23/2013 Time of Hearing: 9:00 a.m. Title of Hearing: Eligibility Hearing

Please specify portion of hearing requested: ☒ Original/Unredacted ☐ Redacted ☐ Copy (2<sup>nd</sup> Party)

☒ Entire Hearing ☐ Ruling/Opinion of Judge ☐ Testimony of Witness ☐ Other

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UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846  
MICHIGAN, .  
. Detroit, Michigan  
. October 23, 2013  
Debtor. . 9:00 a.m.  
. . . . .

HEARING RE. ELIGIBILITY TRIAL  
BEFORE THE HONORABLE STEVEN W. RHODES  
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE CLERK: Court is in session. Please be seated.  
2 Case Number 13-53846, City of Detroit, Michigan.

3 THE COURT: Good morning. Excuse me. We have an  
4 attorney to admit to the Bar of the Court, Miguel Eaton.

5 MR. EATON: Good morning, your Honor.

6 THE COURT: Are you Mr. Eaton?

7 MR. EATON: Yes, sir.

8 THE COURT: Okay. Are you prepared to take the oath  
9 of admission to the Bar of the Court?

10 MR. EATON: Yes, your Honor.

11 THE COURT: Please raise your right hand. Do you  
12 affirm that you will conduct yourself as an attorney and  
13 counselor of the Court with integrity and respect for the  
14 law; that you have read and will abide by the civility  
15 principles approved by the Court; and that you will support  
16 and defend the Constitution and laws of the United States?

17 MR. EATON: I will.

18 THE COURT: Welcome, sir.

19 MR. EATON: Thank you, your Honor.

20 THE COURT: We will take care of your paperwork for  
21 you. And we should go ahead and have appearances entered,  
22 please.

23 MR. IRWIN: Good morning, your Honor. Geoff Irwin  
24 from Jones Day on behalf of the city.

25 MR. STEWART: Geoffrey Stewart, Jones Day, also on

1     behalf of the city, your Honor.

2             MS. LEVINE: Good morning, your Honor. Sharon  
3     Levine, and if I could introduce to the Court my partner,  
4     Jack Sherwood, Lowenstein Sandler, for AFSCME. Thank you.

5             THE COURT: Welcome, sir.

6             MR. MONTGOMERY: Good morning, your Honor. Claude  
7     Montgomery, Dentons US, for the retiree committee, and with  
8     me in the courtroom today with possible speaking roles are  
9     Anthony Ullman, partner in Dentons, and Arthur Ruegger back  
10    there. Thank you, your Honor.

11            MR. SCHNEIDER: Good morning, your Honor. Matthew  
12    Schneider, chief legal counsel, Michigan Department of  
13    Attorney General, on behalf of the State of Michigan, and  
14    with me is Steven Howell, special assistant attorney general.

15            MS. CECCOTTI: Good morning, your Honor. Babette  
16    Ceccotti, Cohen, Weiss & Simon, LLP, for the UAW. I would  
17    also like to introduce my partners, Tom Ciantra sitting here  
18    at counsel table, Peter DeChiara over in the corner, both of  
19    whom you will see predominantly at the trial.

20            THE COURT: Thank you.

21            MR. WERTHEIMER: William Wertheimer, your Honor, on  
22    behalf of the Flowers plaintiffs.

23            MS. GREEN: Good morning. Jennifer Green on behalf  
24    of the General and Police and Fire Retirement Systems, and I  
25    have with me my colleagues Ron King and Bob Gordon.

1 THE COURT: I'm sorry.

2 MS. GREEN: Ronald King and Bob Gordon.

3 THE COURT: Mr. King. Okay.

4 MR. MORRIS: Good morning, your Honor. Thomas  
5 Morris of Silverman & Morris on behalf of the Retiree  
6 Association parties. Also here representing those parties is  
7 Ryan Plecha of Lippitt O'Keefe.

8 MS. PATEK: Good morning, your Honor. Barbara Patek  
9 of Erman, Teicher, Miller, Zucker & Friedman on behalf of the  
10 Detroit Public Safety Unions, and with me this morning are  
11 Julie Teicher and David Eisenberg.

12 MS. BRIMER: Good morning, your Honor. Lynn M.  
13 Brimer appearing on behalf of the Retired Detroit Police  
14 Officers Association. Also with me this morning as trial  
15 counsel are Meredith Taunt and Mallory Field from the firm  
16 Strobl & Sharp, PC.

17 THE COURT: Thank you.

18 MR. BENNETT: Bruce Bennett of Jones Day on behalf  
19 of the city, your Honor.

20 THE COURT: Okay. Then in terms of our order of  
21 proceeding this morning, I'd first like to deal with the  
22 motion in limine and then the three remaining discovery  
23 motions, then the joint final pretrial order, and then we'll  
24 begin the trial. Is that order of proceeding okay with  
25 everyone? Okay.

1           Actually, first, dealing with the motion in limine,  
2 I'm going to waive further oral argument on that and rely on  
3 your papers and conclude, as I suggested I might the other  
4 day, the Court must conclude that it is challenging, if not  
5 difficult, if not impossible, to resolve this motion before  
6 trial and before Mr. Moore is actually testifying. Before  
7 the Court can determine the admissibility of his proffered  
8 testimony, the Court must have before it the questions that  
9 the proponent of the witness asks of him, so in the  
10 circumstances, I will deny the motion but without prejudice,  
11 of course, to the right of any party to object to any of Mr.  
12 Moore's testimony on any appropriate ground.

13           So let's turn our attention then to the three  
14 discovery motions. Who will argue those?

15           MR. CIANTRA: I will start off, your Honor. Thomas  
16 Ciantra, Cohen, Weiss & Simon, for the UAW.

17           THE COURT: Go ahead, sir.

18           MR. CIANTRA: Your Honor, first I want to thank the  
19 Court for its indulgence. Obviously we have been under a lot  
20 of strain and effort to complete discovery in this matter so  
21 that the trial can take place on an expedited basis, and we  
22 appreciate the Court's hearing these issues on an expedited  
23 basis. I'm not going to go over the papers extensively. The  
24 Court has seen the issues and I'm sure has read the papers,  
25 but I will make a presentation, and it's going to be divided

1 basically chronologically.

2           The first part I want to discuss are the documents  
3 and testimony concerning matters which antedate the retention  
4 of Jones Day or the emergency manager's retention, and then  
5 the second part of the argument deals with matters that come  
6 after that point in time and that are really taken up with  
7 our request that the Court revisit the issues that it ruled  
8 upon back in September.

9           So let me begin then with the first part, the  
10 matters that antedate Jones Day's retention, and the issue  
11 has been crystallized by the position that counsel for the  
12 city took in the October 15th e-mail that is attached as  
13 Exhibit 6(d) to the UAW's motion papers with respect to the  
14 city. And what it involves are a series of memoranda that  
15 Jones Day prepared in 2012, approximately at least a year  
16 before the firm was retained to represent the city in this  
17 matter, and these e-mails -- these memoranda are referenced  
18 in an e-mail that discusses a meeting between partner Jones  
19 Day that had been scheduled with Governor Snyder for June  
20 5th, I believe, of 2012, and they're very specific e-mails,  
21 your Honor. They are identified there, and they go to  
22 obviously issues that are at the heart of UAW and other  
23 objectors' issues that they would raise here, the  
24 constitutional protection of the retirees' pensions being the  
25 most salient. And obviously we are seeking production of

1 those documents as well as anything else that may be being  
2 withheld that antedates the retention of Jones Day.

3 Now, the city has sort of taken a selective approach  
4 with respect to these types of materials. Obviously Jones  
5 Day spent a lot of time and a lot of effort to get itself in  
6 a position to impress the state and get hired to represent  
7 the city in connection with this case. There's a very  
8 detailed pitch book that we have marked as an exhibit that  
9 will be discussed throughout this proceeding. They have  
10 produced that. They have withheld these e-mails -- these  
11 memoranda that are attached to the e-mail. And the principal  
12 basis for that decision at this point is the work product  
13 doctrine. They have withdrawn attorney-client privilege.  
14 They weren't retained by the state at any point. And now  
15 they are focusing on work product.

16 And, of course, going back to first principles, the  
17 work product doctrine, as it developed, intended to preserve  
18 a party's lawyer's work on developing the theories and facts  
19 of a case. I mean this is Hickman v. Taylor, the classic  
20 example of an attorney who was interviewing witnesses to an  
21 accident to assist his client's defense of that case. That's  
22 not what's involved here, of course. Jones Day wasn't  
23 retained by the state at any point, and they weren't retained  
24 by the city in 2012.

25 THE COURT: What do you contend was the relevance or

1 would be the relevance of these memoranda in this eligibility  
2 trial?

3 MR. CIANTRA: I think, your Honor, it gets to the  
4 central question of what were the motivations and intent of  
5 the decision-makers here. We know from discovery -- and it's  
6 going to be crystal clear -- that the governor and the state  
7 were well-aware of the constitutional protections that apply  
8 to retiree pensions. They knew that. They were well-aware  
9 of what the position was with respect to the creditor  
10 proposal that the emergency manager made in June. The filing  
11 was authorized without any conditions. We all know that.  
12 These memos we believe will get beyond that, get into the  
13 question of the specifics of knowledge, the specifics of the  
14 intent of the parties to do that, and that's why we're  
15 looking to get them.

16 THE COURT: Okay. Doesn't that statement of  
17 relevance prove more conclusively perhaps than the city could  
18 even on its own that these memoranda are prepared in  
19 anticipation of litigation?

20 MR. CIANTRA: They weren't, your Honor. They were  
21 prepared more than a year in advance of any litigation and by  
22 a firm that was not representing anyone. These were like the  
23 pitch book. They were prepared to market, to develop  
24 theories and to market services. All right. There's no case  
25 law that they cite that would support the assertion of work

1 product privilege for documents that are prepared in this  
2 context. They have selectively produced the pitch book.  
3 It's the same type of material. So for them at this point to  
4 demand work product protection with respect to this we think  
5 is just baseless. I mean this is not a case where maybe a  
6 memo is prepared, the client comes in to meet with the  
7 attorney and reveals confidences, and those are protected.  
8 We all know that. That's basic attorney-client privilege  
9 law, but this is not that situation. This is their marketing  
10 effort to the state to be retained, and we think it is not  
11 entitled to --

12 THE COURT: To be retained for what?

13 MR. CIANTRA: To apparently be retained at some  
14 point. Who knows? At that point there was no emergency  
15 manager. There obviously was no Chapter 9 case. This is  
16 devoid of a litigation context where you could claim work  
17 product. They're not representing a party at this point.  
18 They're pitching.

19 THE COURT: Well, I'm just struggling with what the  
20 relevance of the fact that Jones Day was pitching the  
21 governor a year before would be to this eligibility trial if  
22 that's all you assert it was.

23 MR. CIANTRA: Well, we know that. We know that they  
24 were pitching that. That's clear. They've admitted that.  
25 What's relevant is --



1 THE COURT: My question is relevance.

2 MR. CIANTRA: Well, what's relevant is potentially  
3 the content of the documents, which, of course, we haven't  
4 seen. That we think --

5 THE COURT: To prove what, though?

6 MR. CIANTRA: To prove what these people knew and  
7 what they were intending to do.

8 THE COURT: Regarding what, though?

9 MR. CIANTRA: We think it would be relevant to  
10 assess the conduct that we know occurred in 2013.

11 THE COURT: Which was to file this Chapter 9 case?

12 MR. CIANTRA: Which was to authorize the filing in  
13 the face of the constitutional protections for the pension  
14 benefits.

15 THE COURT: Okay. But doesn't that establish that  
16 these memoranda were in anticipation of litigation?

17 MR. CIANTRA: It can't, your Honor, because of the  
18 simple distance in time. They have not provided any  
19 indication that the memoranda were demanded by the state;  
20 that there was any retention that existed at that point in  
21 time. It's an effort like the pitch book, which is a very  
22 detailed document, to get work. They spent a thousand hours  
23 to get work. That's what law firms do, and that's what's  
24 involved here.

25 Now, obviously we haven't been able -- we don't have

1 the memos. I have the titles of the memos that are revealed  
2 in the e-mail. We don't have them. I can't argue the  
3 specific relevance of the content. I would suggest at this  
4 point --

5 THE COURT: Do you have any case law that  
6 specifically says that pre-retention work by a lawyer cannot  
7 be the subject of the work product privilege?

8 MR. CIANTRA: Well, your Honor, to be honest with  
9 you, I have -- we have done the research. I haven't been  
10 able to find a case that has recognized work product in this  
11 instance. The text of the rule talks about --

12 THE COURT: But you haven't found any that  
13 specifically denies it either, huh?

14 MR. CIANTRA: No, but the --

15 THE COURT: Okay.

16 MR. CIANTRA: But the purpose of work product and  
17 the wording of Rule 26 contemplates a representation. It  
18 contemplates that the lawyer is working for a client  
19 developing facts, developing theories. It does not  
20 contemplate a relationship between parties who never  
21 consummated an attorney-client relationship. Remember, of  
22 course, Jones Day is not working for the State of Michigan  
23 here. That's who these discussions were with. It wasn't  
24 with the City of Detroit. It was with the State of Michigan.  
25 But as I said, your Honor, you know, we haven't had access to

1 the memos. I would suggest --

2 THE COURT: We know, don't we, that as a matter of  
3 law the attorney-client privilege can extend to pre-retention  
4 discussions; isn't that right?

5 MR. CIANTRA: Well, of course. It can extend if the  
6 client -- if the prospective client reveals confidences, but  
7 that's not what's involved here. They're not claiming to  
8 shield the confidences of the State of Michigan.

9 THE COURT: No. My question went to the next  
10 question. If the attorney-client privilege can extend pre-  
11 retention, why not the work product doctrine, too, if it  
12 would -- if it's otherwise in anticipation of litigation?

13 MR. CIANTRA: Well, I think if there were notes of a  
14 meeting that took place where client confidences would be  
15 revealed, that would be -- that would be privileged, but I  
16 don't believe --

17 THE COURT: That's not what we're talking about.

18 MR. CIANTRA: That's not what we're talking about,  
19 at least -- I mean I haven't seen the memos, so I --

20 THE COURT: Let's boil it down to a simple hypo.  
21 Okay. Client calls up attorney and says, "I'm thinking of  
22 retaining you to pursue this claim I have against a potential  
23 defendant. When I interview you, I want to know what your  
24 strategy will be." They have a further conversation about  
25 the facts. The attorney prepares a memo. They have their

1 meeting. Client decides to retain that attorney.

2 MR. CIANTRA: Right.

3 THE COURT: Is that memo protected by work product  
4 or not?

5 MR. CIANTRA: I don't believe it's protected by work  
6 product. I believe parts of it would be protected by  
7 attorney-client in terms of the --

8 THE COURT: Okay. But I'm talking about work  
9 product. You're talking about work product here.

10 MR. CIANTRA: I am talking about work --

11 THE COURT: Not protected by work product. So the  
12 defendant in that case could subpoena that memorandum from  
13 that attorney?

14 MR. CIANTRA: Subject to the client confidences that  
15 were revealed in it cannot be -- would be attorney-client.  
16 We're not challenging --

17 THE COURT: Okay. But otherwise it's disclosable.

18 MR. CIANTRA: Otherwise I think it is.

19 THE COURT: Discoverable.

20 MR. CIANTRA: Yeah. Otherwise I think it is until  
21 there's a retention, especially if there's never been a  
22 retention, which is the case here. This is something that  
23 happened a year before between parties that never had an  
24 attorney-client relationship.

25 THE COURT: Um-hmm. Um-hmm.

1 MR. CIANTRA: As I said, your Honor, we haven't  
2 looked at the memos. I don't know what's in them. I would  
3 suggest and we would request that the Court consider in  
4 camera review of the documents and then make a ruling.

5 THE COURT: Is it just these -- I think you said six  
6 memoranda that are the subject of this dispute?

7 MR. CIANTRA: At this point, that's what it's boiled  
8 down to, your Honor, but we feel that we're entitled to a  
9 decision with respect to this that if there's anything else  
10 out there that we're not aware of -- and, frankly, your  
11 Honor, there's been a lot of documents that have been  
12 produced in a very exigent period of time -- we would like  
13 the city to produce those.

14 THE COURT: All right. Well, we'll inquire -- we'll  
15 inquire about that.

16 MR. CIANTRA: Okay. Now, let me turn to the  
17 second -- let me turn to the second point, and this concerns  
18 the issue that was litigated back in September, September  
19 19th, on the joint --

20 THE COURT: Well, on that one I need you to begin  
21 with a response to the city's assertion that this motion is  
22 late --

23 MR. CIANTRA: It is --

24 THE COURT: -- untimely.

25 MR. CIANTRA: It is late, your Honor. It is late.

1 THE COURT: So why should it be considered?

2 MR. CIANTRA: Well, I think it should be considered  
3 because of the particular facts and circumstances that are  
4 involved here. Back in September as this issue was framed  
5 and as the Court ruled, it was rather narrowly focused with  
6 respect to the question of authorization. That was the  
7 hypothetical that the Court developed to support its  
8 reasoning.

9 THE COURT: Right. I recall that.

10 MR. CIANTRA: And what has happened since then --  
11 and this, I think, is most clearly brought out in the  
12 excerpts from Governor Snyder's deposition that are attached  
13 to both of the motions that UAW filed -- is that that common  
14 interest has moved and morphed well beyond the issue of  
15 authorization that was presented in September to basically  
16 every element of -- every material element with respect to  
17 the case, the development of the creditors' proposal, the  
18 discussion of Article IX, Section 24, and its protections  
19 here, consideration to be provided to creditors under the  
20 proposed plan, consideration to be provided to the pensioners  
21 under the proposed plan. It has just morphed into  
22 essentially a cloak with respect to -- and excuse me; it's  
23 very dry -- with respect to all of the deliberations  
24 involving the emergency manager and the state, and while, you  
25 know, we concede the city is correct, there is an attorney-

1 client privilege that they have, the -- it should be  
2 construed narrowly in light of the public interest that's  
3 involved here. The emergency manager by law is the governing  
4 body of the City of Detroit. He has executive and  
5 legislative authority rolled into one. His actions obviously  
6 affect the 700,000 residents of the city, and people have a  
7 right, we submit, to know what his deliberations are, how  
8 policy is being formulated, and it shouldn't be cloaked under  
9 a very broad and we would submit legally unsupported  
10 construction of the attorney-client privilege. Discovery has  
11 been curtailed, and it has put us in a position where now we  
12 are facing trial, and we have not been able to -- because of  
13 the extensive theory of privilege that the state and the city  
14 have adhered to, to develop facts fully in deposition and  
15 otherwise.

16 We would submit that the assertion of the privilege  
17 that the governor has made, as revealed in the deposition  
18 transcripts that has been taken throughout the discovery, is  
19 extensive beyond what was considered in the Court's September  
20 19th ruling, and we would ask the Court to -- respectfully to  
21 reconsider it because otherwise we have secrecy. We have  
22 public actors here, your Honor. The public has to be able to  
23 hold political representatives accountable for their actions.  
24 They have to know what policy decisions are being made, and  
25 right now this privilege ruling has cloaked that in secrecy.

1 I don't have anything else, your Honor, to state.

2 THE COURT: Thank you.

3 MR. CIANTRA: I don't know if Mr. Wertheimer, who  
4 has joined the motions for the Flowers plaintiffs, has  
5 anything he would like to add.

6 THE COURT: Okay.

7 MR. CIANTRA: Thank you for your consideration.

8 MR. WERTHEIMER: William Wertheimer, your Honor.  
9 First, I would like to join in the UAW's motion vis-v-vis the  
10 city. I did formally join on the papers the motion vis-a-vis  
11 the state.

12 I just have two points in addition to what Mr.  
13 Ciantra just argued. One relates to the Snyder deposition,  
14 which I participated in, and kind of what it revealed about  
15 the scope of the privilege arguments now being made and how  
16 far we are from the day in court where you made it a point of  
17 indicating to the state that transparency was necessary here.  
18 At the governor's deposition essentially privilege was  
19 invoked as to the entire content of weekly meetings that the  
20 governor had with the emergency manager for months as to the  
21 entire scope of those meetings making it virtually impossible  
22 to examine the governor as to any of that. That's point  
23 number one.

24 And just one other point, and that is that in the  
25 normal case -- well, let me back up. Per the agreement the



1 parties made and given the position of the governor, we  
2 agreed to limit our discovery deposition to three hours. In  
3 the normal case where privileges are alleged on privilege  
4 logs like what we have here, you have an opportunity to go  
5 beyond the privilege log and the cursory explanation for why  
6 the privilege is being invoked by at deposition asking  
7 witnesses questions, detailed questions about the particular  
8 meeting at which they're claiming a privilege, you know, what  
9 the other subjects were, how long the meeting took, did the  
10 lawyer do anything at the meeting, et cetera, as to key  
11 documents. We have not had that opportunity here just given  
12 the time, and I'm not -- no one is at fault for that. It's  
13 going too fast. We had three hours with the governor. We  
14 did appropriate examinations. But I think in this  
15 circumstance that it would make sense for this Court to  
16 examine certain of the documents in camera in order to assure  
17 that the Court's desire and everybody's desire for  
18 transparency is met. I think this is a special case. I  
19 don't think --

20 THE COURT: Are you referring to documents other  
21 than these six memoranda attached to the e-mail?

22 MR. WERTHEIMER: I am, your Honor. I'm referring  
23 specifically to documents that are in dispute that are in the  
24 state's possession.

25 THE COURT: Can you identify them any more

1 particularly for me or the record?

2 MR. WERTHEIMER: We've attempted to identify them to  
3 the state by indicating in logs documents that covered a  
4 particular -- what we believe to be a key time period was.  
5 We've also attempted to limit the request in terms of those  
6 in which Mr. Orr and Mr. Snyder were directly involved, but I  
7 must admit to the Court it still involves, at least at this  
8 point, in terms of our back and forth, a fairly large number  
9 of documents that I would respectfully suggest that the best  
10 way to proceed -- given the fact that the governor is going  
11 to be testifying on Monday at trial, the best way to proceed  
12 may be for the Court to get involved in terms of in camera  
13 review.

14 THE COURT: And these are documents which you claim  
15 were improperly withheld pursuant to the common interest  
16 exception?

17 MR. WERTHEIMER: Not just common interest, your  
18 Honor, also just documents where they claimed attorney-  
19 client. And we're not claiming -- we don't know whether  
20 they're improperly withheld I guess is what I'm trying to  
21 say. We're claiming that they may be --

22 THE COURT: You're concerned. Okay.

23 MR. WERTHEIMER: -- and that we should not have to  
24 rely upon the cursory description of counsel given --

25 THE COURT: Well, but in order for me to accede to

1 your request to look at documents, we have to have identified  
2 what documents you want me to look at and what documents you  
3 want the city or the governor or the state -- excuse me -- to  
4 produce to me.

5 MR. WERTHEIMER: What I'm -- I agree, your Honor,  
6 and what I'm suggesting is we did make such an effort on a  
7 preliminary basis with the state in trying to resolve it, but  
8 I'm acknowledging that that effort would still -- if we stop  
9 there, would still leave your Honor with a large number of  
10 documents. We could continue that effort. I agree that that  
11 would be necessary, but I still think that it calls for in  
12 camera review of relevant documents or potentially relevant  
13 documents. And we're happy to work with the state to try and  
14 limit what that -- what the documents would be.

15 THE COURT: Well, when are you going to do that  
16 given that we're in trial all day today, tomorrow, and  
17 Friday?

18 MR. WERTHEIMER: Well, if we can't, we can't, and  
19 then I would suggest to the Court that the limitation which  
20 we did communicate to the state should be the one the state  
21 should use -- or that we should use. And as I recall, there  
22 were at least two attempts to limit the documents. One  
23 related to time; that is, we said we think that the judge  
24 should be able to take an in camera look at documents between  
25 key players from date A to date B, and I don't have in front

1 of me exactly what those dates were. And, second, we  
2 indicated that the documents directly between the governor  
3 and the emergency manager over a broader period of time  
4 should be subject to in camera review. If there's no time to  
5 do anything else, our position would be that the Court should  
6 examine those documents in camera.

7 THE COURT: All right. Thank you, sir.

8 MR. WERTHEIMER: Yes, your Honor.

9 THE COURT: While you're sitting down, I would  
10 suggest you try to figure out what those dates are. That  
11 would be helpful.

12 MR. SCHNEIDER: Your Honor, Matthew Schneider on  
13 behalf of the state. Mr. Wertheimer has raised some issues  
14 that relate to this and also to the other motion, so in  
15 expediency here I can kind of respond to both.

16 THE COURT: Please.

17 MR. SCHNEIDER: The first issue here that Mr.  
18 Wertheimer's -- or the UAW and Flowers objectors raised  
19 relates to a March 12 e-mail, and the objection was that it  
20 should have been produced without redactions. Now, the state  
21 disagrees, but we want to resolve this dispute, and we have  
22 produced that anyway, so we're not waiving the attorney-  
23 client privilege or altering the common interest agreement or  
24 anything by doing that, but I wanted to let you know at least  
25 one issue has been resolved. Secondly --

1 THE COURT: When you say "has been resolved," you  
2 say you have or are willing to turn over the memos?

3 MR. SCHNEIDER: We have. This is related to the  
4 March 12 e-mail.

5 THE COURT: March 12 --

6 MR. SCHNEIDER: It's an e-mail from Richard Baird to  
7 Kevyn Orr, and this was at issue.

8 THE COURT: -- 2012?

9 MR. SCHNEIDER: 2013.

10 THE COURT: Okay.

11 MR. SCHNEIDER: Okay. Secondly, there's another  
12 argument that the state hasn't been specific on its privilege  
13 log, and I think that's why this is kind of bleeding  
14 together. Again, the state disagrees. We think the logs are  
15 sufficient, but we've revised these anyway, and we've -- you  
16 know, we're giving them to Mr. Wertheimer. So, again, we're  
17 not waiving anything, but we want to let the Court know that  
18 we are working with them and are happy to do so. But,  
19 finally, third --

20 THE COURT: It was a little frustrating that your  
21 log didn't provide any identifying information regarding the  
22 people involved other than their names.

23 MR. SCHNEIDER: Well, we've corrected that.

24 THE COURT: Where? How?

25 MR. SCHNEIDER: Well, Mr. Wertheimer asked for

1 additional information that's more specific on the privilege  
2 log, and I believe we've done that, and --

3 THE COURT: In the log itself because we looked at  
4 the revised log -- at least I did, and all I saw were names?  
5 Now, it's possible that I missed a page where the names were  
6 identified, whether they're attorneys or officers of the  
7 state or associated with the emergency manager. I couldn't  
8 tell who was who.

9 MR. SCHNEIDER: My understanding is there's more  
10 description about what actually is in there, but I will --  
11 you know, I will continue to work with Mr. Wertheimer on this  
12 so as to not -- not to delay.

13 The third issue here is relating to the common  
14 interest agreement, and I think that's where the Flowers and  
15 the UAW objectors are really going here. The state's  
16 position ultimately at the end of the day -- the state's  
17 position is is that your order, your Honor, that you entered  
18 on September 19 was correct, and we believe that it was  
19 correct then and it's correct today. And the new position  
20 that the objectors are raising is essentially that there's no  
21 common interest privilege before the filing. This is -- as  
22 the Court is aware, this has been brought to your attention  
23 literally -- literally -- on the eve of trial. There was a  
24 deposition in which the Court invited the parties to contact  
25 the Court in case there were concerns. They never did that.

1 They never raised a written objection after the deposition.  
2 It's beyond the 14-day rule, and there's no defect or no  
3 error shown, so I think there's a waiver here, and,  
4 therefore, it should be denied on that ground.

5 In addition, the common interest agreement here as  
6 to the argument that the objectors are trying to find  
7 information that antedate the appointment of the emergency  
8 manager, if you look at the common interest agreement itself,  
9 it states that this isn't just about the appointment of the  
10 emergency manager. It states that the parties have a common  
11 interest in relation to the city's financial emergency and  
12 the bankruptcy case and the emergency manager, so this goes  
13 to a lot more than just the Chapter 9 filing. It goes to the  
14 financial emergency and things in connection with the policy  
15 issues and the legal discussions related to that. Thank you.

16 THE COURT: Thank you.

17 MR. IRWIN: Thank you, your Honor. I will address  
18 the motion to compel the Jones Day materials first and then  
19 the motion for reconsideration. The request that has been  
20 made as it relates to core Jones Day internal research  
21 memoranda it seems to us is antithetical to the work product  
22 privilege, and we think the Court's analogy is exactly right.  
23 If a client prepares a legal -- if a lawyer prepares a legal  
24 memoranda to assist him or her or a team of lawyers in order  
25 to deliver legal advice to a potential client -- a client or

1 a potential client, even before there is an attorney-client  
2 relationship, that is wholly protected by work product if it  
3 reflects the attorney's mental impressions and it puts him or  
4 her in a position where they can deliver appropriate legal  
5 advice. And it shouldn't matter if that attorney-client  
6 relationship is ultimately consummated or not. It is an  
7 inviolable attorney work product that is -- belongs to the  
8 lawyer who prepared it and puts them in a position where they  
9 can effectually do their jobs and deliver legal advice.

10 Now, what happened in this particular situation,  
11 just to put a finer point on it, is I think not the subject  
12 of any real debate. Everyone knew that Detroit was in  
13 trouble in late 2011 and that there were people working this  
14 problem, and that included people from the state. It  
15 included people from the city. It included numerous advisors  
16 and consultants. It involved numerous law firms, and there  
17 were lots of people who wanted to get involved. And Jones  
18 Day had the opportunity to do just that, and we --

19 THE COURT: So why doesn't it matter that the work  
20 product was for the state, for the governor or state  
21 officials, and the ultimate client wound up being none of  
22 those but the city?

23 MR. IRWIN: Well, I think it was all part of the  
24 same problem. I think that the entity that had the problem  
25 here was the city, and I think the law firms like Jones



1 Day -- and I think that the papers that we submit support  
2 that -- were hoping and expecting to be retained and engaged  
3 by the city. And it's not -- it shouldn't surprise anyone  
4 that Jones Day would have been doing legal research in order  
5 to put itself in a position to assist the city in that  
6 regard, and so it really didn't matter which of the entities  
7 was -- not engaging in the sense of an attorney-client  
8 representation, but was discussing these matters with Jones  
9 Day. Jones Day had to put itself in a position where it was  
10 able to represent the city effectively, and in order to do  
11 that, it had to investigate this entire situation. There was  
12 a legal analysis that you would expect to have been done on a  
13 number of levels, and we have, you know, memoranda that came  
14 about as a result. And if the Court would be --

15 THE COURT: Well, okay, but what's the foundational  
16 basis for the work product privilege that shields otherwise  
17 relevant facts from discovery and suggests that that basis  
18 should apply to memoranda such as you claim privilege for  
19 here?

20 MR. IRWIN: Well, it's if they're prepared in  
21 anticipation of litigation, and as we've indicated in the  
22 papers, that's a broad standard. You don't have to  
23 anticipate a specific piece of litigation. You can  
24 anticipate litigation broadly. You can anticipate that this  
25 is a city in financial crisis and that they are going to need

1 assistance moving forward. It might take the path of a  
2 Chapter 9. It might not. It might take the form of numerous  
3 private lawsuits against individual stakeholders in all of  
4 this. And a law firm has to be able to explore those various  
5 options to put itself in a position where it can ably  
6 represent the ultimate client here, which turned out to be  
7 the city.

8           We also -- your Honor, the -- we're having a hard  
9 time understanding the relevance here of the memoranda as  
10 well. We are happy to provide them to the Court in camera.  
11 If the Court would like to see the memoranda, we have the  
12 memoranda. We can easily provide them, and the Court could  
13 determine for itself if, in fact, it finds these memoranda  
14 either surprising or relevant in some way. And what we have  
15 done here, your Honor, is we've proposed a structure or a  
16 framework that I would submit is reasonably conservative  
17 under the circumstances in terms of the number of privileges  
18 and the nature of privileges that we could assert. What we  
19 have done here is we have, in fact, already released the --  
20 many of the e-mails that reflect the conversations between  
21 Jones Day lawyers and the folks in 2012 who were working on  
22 this problem. This, again, is before there's any attorney-  
23 client relationship with anyone. We've released those, and  
24 we're not claiming those back. We are seeking an order from  
25 the Court is to protect our wholly internal memoranda or

1 internal deliberations, which conversations are not --

2 THE COURT: Now, when you say "wholly internal" --

3 MR. IRWIN: Yes.

4 THE COURT: -- do you mean that these memoranda were  
5 not shared even with the state officials?

6 MR. IRWIN: We will make that determination, but we  
7 believe there are memoranda at issue here that were not  
8 shared with anyone from the state, so our -- we are asking to  
9 be able to withhold our internal research memoranda even  
10 though work product would protect that. The work product,  
11 because there's no waiver of work product, unlike attorney-  
12 client, as long as you share it with someone who is in a  
13 nonadversarial -- you share it in a nonadversarial way. It's  
14 not like attorney work -- it's not like attorney-client in  
15 that regard. We believe that we would still have work  
16 product protection over those materials, and so we are asking  
17 for the Jones Day research materials and the Jones Day  
18 internal conversations about how to proceed here and how to  
19 deliver advice should be protected.

20 Now, there comes a point in time later in 2012 when  
21 a specific client opportunity presents itself in the form of  
22 being hired by the city, in the form of this RFP process, and  
23 the public document that is the pitch material that is in the  
24 record already and that we not seeking to disclose, but  
25 insofar as documents relating --

1 THE COURT: You mean not seeking not to disclose?

2 MR. IRWIN: I'm sorry, your Honor. Yes. It's in  
3 the record right now. We are not seeking to clawback or  
4 anything like that. That's not an issue here. But we are --  
5 we do believe that -- as the Court referenced, because pre-  
6 engagement conversations between a lawyer and a potential  
7 client are still protected by the attorney-client privilege,  
8 we are seeking -- we are seeking protection for those  
9 communications, communications -- outbound communications  
10 from Jones Day in the retention period where we are receiving  
11 confidential information and acting upon it. We do think at  
12 that period of time, attorney-client protection would attach  
13 as well as attorney work product. But in the 2012 time  
14 period, which is what the UAW's motion is directed towards,  
15 we are simply asserting work product for the Jones Day legal  
16 research that was conducted to put ourselves in a position to  
17 ultimately be hired in to assist the city.

18 THE COURT: So are you telling the Court that you  
19 don't have any objection to disclosing and don't claim work  
20 product privilege as to any memoranda that was shared with  
21 one or more state officials?

22 MR. IRWIN: That's right.

23 THE COURT: And have you already turned over all  
24 such memoranda and communications that were given to state  
25 officials?

1 MR. IRWIN: No. The answer is no, but we are  
2 prepared to do that. We are not standing on that.

3 THE COURT: Okay. Thank you, sir.

4 MR. IRWIN: Yeah. Does the Court wish to hear on  
5 the motion for reconsideration?

6 THE COURT: Yes. Yes, I do.

7 MR. IRWIN: Yes.

8 THE COURT: If you'd like to address that, I'd like  
9 to hear from you, of course.

10 MR. IRWIN: I would, your Honor. As we indicated,  
11 we think this is late. This is -- there is no -- there's  
12 nothing in the papers that have been submitted that indicate  
13 a good reason for reopening this. There is no palpable  
14 defect in the ruling, and there is nothing new. There's no  
15 new evidence. There's no -- despite the fact that they occur  
16 in the same motion, there's no linking of these two issues,  
17 and so there's, therefore, no good reason -- and I haven't  
18 heard one offered -- as to why this matter should be  
19 reopened. And the parties have, in fact, been relying on  
20 this ruling in connection with all of the discovery  
21 proceedings that have taken place since then. We think the  
22 ruling was sound. The objectors have not indicated why there  
23 is any reason to disturb the Court's analogy of a board of  
24 directors and corporation counsel and the fact that they  
25 should be permitted and need to talk to each other in order

1 to reach a sound conclusion as to whether to do something  
2 like file for bankruptcy. We think that's analogous here.  
3 The governor and his legal team and the emergency manager and  
4 his legal team need to be able to talk. They need to be able  
5 to talk in confidence with regard to the common interest,  
6 which, again, this is counsel to what -- contrary to what we  
7 heard, broader than simply a Chapter 9 filing. The common  
8 interest related to the city's financial -- the city's  
9 financial crisis more broadly and the right legal path  
10 forward. And insofar as the communications related to a  
11 legal path forward, that privilege was properly invoked. And  
12 I do recall that the Court -- I read -- I was not here, but I  
13 understand that the Court made itself available to the  
14 parties if, in fact, there were specific questions because  
15 it's very difficult to know exactly what form these questions  
16 will take in making a ruling, and I believe the Court offered  
17 its services to the parties if, in fact, there was any  
18 impasse at the depositions, and I don't believe any objectors  
19 took advantage of that, and so we believe that under the  
20 circumstances, given that the ruling was fundamentally  
21 correct, that there was no attempt at the time to seek  
22 further court intervention and that we've been relying on  
23 these rulings going forward, that there is no reason to  
24 overturn them at this time.

25 THE COURT: Thank you, sir.

1 MR. IRWIN: Yeah.

2 THE COURT: Brief rebuttal.

3 MR. CIANTRA: Just very briefly, your Honor. I just  
4 want to draw the Court's attention to a couple of matters.  
5 First, with respect to the Jones Day memos, to the extent the  
6 Court determines to review the memoranda in camera, we'd  
7 request that the Court also review the cover e-mail that  
8 enclosed the memoranda. And I'm not --

9 THE COURT: This was an e-mail from who to whom?

10 MR. CIANTRA: This was an e-mail from Heather Lennox  
11 of Jones Day to certain of her partners at Jones Day that  
12 references the meeting with the governor, and I'm not going  
13 to read the e-mail because they've claimed in the October  
14 15th correspondence to myself that it's privileged, but it  
15 goes to the -- I think goes to the issue that the Court was  
16 addressing with respect to --

17 THE COURT: So these memoranda are internal in the  
18 sense that they were not shared with any officials of the  
19 state or the city?

20 MR. CIANTRA: It is unclear to me that that can be  
21 said with any degree of assurance, and it seems entirely --

22 THE COURT: Well, but Mr. Irwin states it here on  
23 the record. Do we doubt it?

24 MR. CIANTRA: I did not hear that. I did not hear  
25 him say definitively that those memos were not shared with

1 anyone at the state, and from the --

2 THE COURT: Well, let's just ask to be sure. Mr.  
3 Irwin.

4 MR. IRWIN: We will -- I will absolutely  
5 investigate. That's part of what we're saying. We will  
6 investigate that, and we'll have a clear answer.

7 THE COURT: Oh, all right.

8 MR. CIANTRA: So we don't have --

9 THE COURT: So there you go.

10 MR. CIANTRA: So we don't have a clear answer, but I  
11 would suggest that if you -- if the Court reviews the e-mail  
12 that they are claiming privilege with respect to, the  
13 conclusion can be drawn that the substance of those memos was  
14 surely shared in that meeting, and it would seem, at a  
15 minimum, that would arguably constitute a waiver along with  
16 the production of the pitch materials, which go into  
17 considerable detail with respect to the legal theories that  
18 were involved here.

19 THE COURT: All right.

20 MR. CIANTRA: The second issue I just wanted to just  
21 very -- just brief clarification with respect to the  
22 privilege logs. We filed -- we requested that the state  
23 supplement the privilege logs, and that is in the  
24 correspondence that is attached to the motion that we filed  
25 with respect to the state because there was no specification



1 in certain cases of who was involved in the communications,  
2 who authored them, who received them, or the subject matter  
3 of many of the -- of all of the communications, so we had no  
4 way to assess the assertion of privilege based on the logs.  
5 In response to that correspondence, they revised the logs, so  
6 this is what the Court referred to, but we only received  
7 those within the past day or two --

8 THE COURT: Right. I know.

9 MR. CIANTRA: -- so we haven't had the opportunity  
10 to, you know, line that --

11 THE COURT: Right.

12 MR. CIANTRA: -- up, but I just wanted the record to  
13 be clear with respect to that.

14 THE COURT: No. I appreciate that very much.

15 MR. CIANTRA: Yeah, yeah. Obviously with respect to  
16 the -- having not filed this within 14 days, your Honor,  
17 obviously the discovery here was unfolding well past the  
18 deadline for the production, and we have not -- we've done  
19 the best we could. This was not an intentional delay on our  
20 part. As these issues developed, it became clear to us that  
21 the scope of what was being withheld we felt was inconsistent  
22 with what the Court had permitted.

23 THE COURT: All right. I'm going to take this under  
24 advisement until ten o'clock, and I'll give you a decision  
25 then.

1 THE CLERK: All rise. Court is in recess.

2 (Recess at 9:49 a.m., until 10:00 a.m.)

3 THE CLERK: All rise. Court is in session. Please  
4 be seated. Recalling Case Number 13-53846, City of Detroit,  
5 Michigan.

6 THE COURT: All counsel are present. Ma'am.

7 MS. GREEN: Good morning, your Honor. I apologize.  
8 I think our motion got lost in the shuffle. The Retirement  
9 Systems filed a similar motion to the UAW's. I just have a  
10 few --

11 THE COURT: I was actually going to hear it after,  
12 but if you'd like to be heard now, that's fine.

13 MR. GREEN: Oh, you know, I just -- it dovetailed  
14 with what they were arguing, so I just had a few points --

15 THE COURT: Okay. Go ahead.

16 MS. GREEN: -- to raise. The first thing I wanted  
17 to add is that at the time we drafted our motion, we thought  
18 that the June 5th, 2012, e-mail was being reasserted as  
19 privileged. Mr. Irwin in his argument this morning has said  
20 that they are not waiving privilege -- or they are now  
21 waiving privilege to that. It is back in the record. So to  
22 clarify, the e-mail does say that the memos were shared with  
23 the treasurer. It says they were memos that we did for Andy.  
24 I presume that means they were shared with him. I don't know  
25 if that's actually true or not, but the memo does seem to

1 indicate that they were shared with a third party.

2           As far as the work product analysis, in our brief we  
3 went through the relevant standard in the Sixth Circuit, your  
4 Honor, and I don't believe that we talked about that yet  
5 today. There's a two-part test. The first part of that test  
6 is whether the document was prepared, quote, "because of the  
7 party's subjective anticipation of litigation, as contrasted  
8 with ordinary business purpose, and (2) whether that  
9 subjective anticipation was objectively reasonable." And,  
10 furthermore, the driving force behind the preparation of the  
11 document is what is key, and we assert that the "because of"  
12 part fails. They did it because of the fact that they were  
13 trying to prepare themselves for the prospect of being hired,  
14 not because of the fact that there was actually anticipated  
15 litigation. And, moreover, it's very attenuated that in 2011  
16 they had some kind of crystal ball that they knew two years  
17 from now they were going to be in this courtroom arguing  
18 about eligibility under Chapter 9. And we did cite case law  
19 in our brief. You had asked counsel this morning if there  
20 was any case law regarding some kind of temporal factor, and  
21 we cited two cases. One states, "the mere fact that  
22 litigation does eventually ensue does not, by itself, cloak  
23 materials with work product immunity," so between that and  
24 the next case that we cited, "The abstract possibility that  
25 an event might be the subject of future litigation will not

1 support the claim of privilege," I think those are  
2 dispositive. This was two years before any of this even  
3 arose.

4 Furthermore, I think that goes to whether or not the  
5 anticipation of litigation could be objectively reasonable.  
6 I don't know how two years prior to the litigation it could  
7 be objectively reasonable that, number one, PA 4 still had to  
8 get past the referendum. Number two, it was ten months  
9 before the EM was hired even if you assume that these were  
10 prepared in June of 2012 when the memo -- memos were shared  
11 with the governor or with Andy Dillon. They may have been  
12 prepared prior to that. We don't know. Moreover, the EM had  
13 to be appointed. PA 436 had to become effective. All of  
14 these things had to happen before we could be here today, and  
15 Jones Day had to be retained. So there are like at least  
16 five or six major contingencies that had to occur before the  
17 actual litigation would ensue.

18 Furthermore, even if they can establish the work  
19 product, which we don't think they can, they still have to  
20 overcome the waiver issue, and I don't -- I think that today  
21 is a further example that they have selectively waived. They  
22 waived the memo itself but not the attachments. Today the  
23 state stood up and said, you know, "We have an e-mail from  
24 March 3rd, 2013, between Kevyn Orr. There are two attorneys  
25 on it from the State of Michigan. But to be cooperative, we

1 will give you that e-mail." Well, if they're saying it's  
2 privileged but they're giving it to us, to me, again, that's  
3 a selective waiver. They just give us what they want when  
4 they want it, but they keep what they want as well, and I  
5 don't see how they get past that.

6 In addition, my last point would be it's still not  
7 clear who the client is that Jones Day is claiming they've  
8 been representing. No city official, to my knowledge,  
9 through any of my review of these documents or the e-mails --  
10 there is not a single city official that is ever cc'd, bcc'd,  
11 you know, sent the memos. It's purely between Jones Day  
12 attorneys, Miller Buckfire, Huron Consulting, all of these  
13 advisors that, again, when I think it comes to waiver,  
14 clearly these are third parties and not the potential client.

15 The last point I will make because I want to be  
16 brief -- I know you are ready to rule, I think -- is that I  
17 think the wrong standard was stated earlier by the city. He  
18 said that there's a different standard for waiver of the  
19 attorney-client privilege versus work product, and that is  
20 not true in the Sixth Circuit. We cited two cases in our  
21 brief. The first one is New Phoenix Sunrise, and it says,  
22 "Both the attorney-client privilege and work product  
23 protection are waived by voluntary disclosure of private  
24 communications to third parties." We also cited the In re.  
25 Columbia case also --

1           THE COURT: I'm sorry. Are waived by what? I just  
2 didn't hear what you said.

3           MS. GREEN: Disclosure of private communications to  
4 third parties. And he had said that some sort of different  
5 standard applied when it was work product versus attorney-  
6 client, and we also cited the In re. Columbia case that said  
7 the same thing. There's no compelling reason for  
8 differentiating waiver of work product from waiver of the  
9 attorney-client privilege, so to me it's a distinction  
10 without a difference to say, "Well, we gave it to," and I  
11 think the quote he said a minute ago was, "numerous  
12 consultants and advisors as well as the state." And to me  
13 that is disclosing it to third parties; therefore, it was  
14 waived when it was created a year or two ago, not to mention  
15 the fact that as part of this litigation, they have  
16 selectively waived certain e-mails that somewhat have to do  
17 with this subject matter in that they relate to, for  
18 instance, reviewing the consent agreement or reviewing and  
19 commenting on PA 4 and the analysis related to PA 4. And we  
20 cited case law in our brief stating that if you waive the  
21 privilege on selected pieces, you, therefore, waive it as to  
22 the entire subject matter, and, therefore, you can't  
23 selectively say, "Well, you can have the e-mail, but you  
24 can't have the attachments," or, "You can have this e-mail,  
25 but you can't have this e-mail." So we would say that the

1 entire privilege has been waived by selectively waiving it as  
2 to a few e-mails here and there. Those are my comments.

3 THE COURT: Thank you.

4 MS. GREEN: Thank you.

5 MR. IRWIN: I'll simply respond to those few points  
6 that counsel made. The first, in connection with whether the  
7 timing of all of this should make a difference, I would  
8 submit that that is arbitrary. There are lots of things that  
9 could have happened in the middle of 2012 that would have  
10 been litigation events. Maybe they didn't, but that doesn't  
11 mean that at the time that all of this was being considered,  
12 when legal advice -- or when Jones Day was considering some  
13 of these issues, they weren't anticipating litigation. It is  
14 fortuitous that this happened two years later, actually, a  
15 year and a half later or one year later, but that doesn't  
16 mean that either potential clients or Jones Day were not  
17 working in anticipation of litigation, which, as we indicated  
18 in our brief, does not need to be a specific litigation  
19 event. You can anticipate litigation broadly. You never  
20 know what form it will take. You know there are going to be  
21 fights. You know there will be disputes. You don't know if  
22 it'll be a private -- private lawsuits. You don't know if  
23 it'll be a Chapter 9 filing, but you can anticipate the need  
24 for legal advice in an adversarial proceeding in some form  
25 and meet the standard.

1           In terms of select -- whether there's been selective  
2 waiver or subject matter waiver, as counsel suggests, this is  
3 I think fundamentally incorrect. The standard for subject  
4 matter waiver is whether documents have been disclosed. It's  
5 the shield and sword problem. It's if documents have been  
6 disclosed and counsel intends to rely on them affirmatively  
7 and yet withholds the balance of the documents that, in  
8 fairness, should be considered, and I think this is codified  
9 pretty clearly in the advisory committee notes to Federal  
10 Rule 502 where they say, "Thus, subject matter waiver is  
11 limited to situations in which a party intentionally puts  
12 protected information into the litigation in a selective,  
13 misleading and unfair manner. Under both Rules, a party that  
14 makes a selective, misleading presentation that is unfair to  
15 the adversary opens itself to a more complete and accurate  
16 presentation." We are not -- we, the city, are not using any  
17 of these materials affirmatively. They are not on our  
18 exhibit lists. We are not introducing them through  
19 witnesses. We are not using them to our advantage that  
20 should open us to some sort of claim of subject matter waiver  
21 or selective disclosure under the rules.

22           And then lastly, I think fundamentally there is --  
23 and I believe this is black letter law -- there are different  
24 standards for whether there is waiver by disclosure under  
25 attorney work product as opposed to attorney client. If you



1 disclose attorney-client communications to a third party, you  
2 are much more likely to be deemed to have waived that  
3 privilege, but with attorney work product, you can make  
4 disclosures. And as long as they are disclosures to parties  
5 who are nonadversarial, then you can still enjoy that  
6 protection. And that is a fundamental difference between the  
7 two privileges. It is not something where they are -- where  
8 disclosures to folks who are within the potential group of  
9 clients or advisors who are working these problems operates  
10 to waive the privilege. And I think we've demonstrated that,  
11 your Honor.

12 THE COURT: I want to -- I want to be sure the  
13 record accurately reflects your position regarding what's to  
14 be disclosed and what isn't. Is it correct that to the  
15 extent any of these memoranda that were attached to this June  
16 2012 e-mail from Ms. Lennox were disclosed to state  
17 officials, you are willing to make them available to counsel  
18 here?

19 MR. IRWIN: Yes, your Honor, but the e-mail itself  
20 suggests -- if memoranda was prepared to prepare a Jones Day  
21 lawyer for a meeting with counsel, that would not be. It's  
22 not my understanding of what we're talking about.

23 THE COURT: Okay. But you don't know which of the  
24 several memoranda were shared and which weren't?

25 MR. IRWIN: We'll do that.

1 THE COURT: How will you determine that or --

2 MR. IRWIN: Because we have the -- the Jones Day  
3 lawyers are accessible, and we can figure that out.

4 THE COURT: All right. Thank you.

5 MS. GREEN: I have a brief rebuttal.

6 THE COURT: Yes, of course.

7 MS. GREEN: I think the hypo that you stated earlier  
8 compared to what he just said -- you know, these were memos  
9 preparing a Jones Day lawyer to go seek work -- is different  
10 than the hypo that you stated earlier, which was you meet  
11 with a client who wants to meet with you for the purpose of  
12 retaining you, and you may make notes. That's different to  
13 me than, "I did memos to prepare myself to go pitch a  
14 client." To me those are two different scenarios, and  
15 there's a distinction, I think, between did the state ask for  
16 this work, or was Jones Day just doing it internally, again,  
17 to prepare. I think those are two distinct scenarios.

18 One other thing that occurred yesterday, you made a  
19 note on the record about PA 4 and that perhaps the intent  
20 behind the appropriation -- the inclusion of the  
21 appropriation was a factual issue for this trial, and I think  
22 that some of the e-mail correspondence may go to that issue,  
23 quite frankly, because the PA 4 appropriation was extensively  
24 discussed in all these e-mails, and for that reason I think  
25 there is a possibility that it would become relevant to a

1 separate issue than what Mr. Ciantra stated this morning,  
2 which was the good faith and the bad faith issues and things  
3 like that.

4           The last thing I would offer is our Exhibits 31  
5 through 65 have a lot of the e-mail correspondence that has  
6 been produced by the city, and there is a lot of, I guess,  
7 internal -- what they would consider their internal work  
8 product in those e-mails. I don't concede it's work product,  
9 but according to what they are defining as work product, it's  
10 in those e-mails, and it's already been produced, and it's  
11 been waived. So if you'd like to look at those e-mails to  
12 sort of familiarize yourself with what we're talking about,  
13 I've produced a copy of our binder for your clerk this  
14 morning if you'd like to look at those. Thank you, your  
15 Honor.

16           THE COURT: All right.

17           MS. BRIMER: Your Honor, I'll be very brief.

18           THE COURT: Why should I hear you? You're not a  
19 party to these motions.

20           MS. BRIMER: I understand that, your Honor. I want  
21 to clarify one matter on the record that Ms. Green made,  
22 and --

23           THE COURT: I will let you clarify a statement on  
24 the record, but I can't let you argue on one side or the  
25 other of these motions.

1 MS. BRIMER: That's fine, your Honor. And Ms. Green  
2 raised the issue of your ruling on Monday with respect to the  
3 intent of the appropriation in PA 4, and I want to be sure  
4 the record is very clear that it's the appropriation in PA  
5 436 that your Honor ruled may be a factual issue that prior  
6 to that was not considered a factual issue. I want to be  
7 sure the record is very clear on that, which law we are  
8 addressing, your Honor. It may have an impact on the memos.  
9 Thank you.

10 THE COURT: Thank you, I guess. All right. On the  
11 issue -- on the first issue, which is the motion for  
12 reconsideration of the Court's previous ruling on the common  
13 interest doctrine, the Court concludes that the record does  
14 not establish cause to consider that motion out of time, and,  
15 accordingly, for that reason alone, the motion is denied.

16 But having said that, I want the record to be clear  
17 and the parties to understand that to the extent a question  
18 is asked of a witness and either a witness or counsel on the  
19 witness' behalf claims attorney-client privilege and asserts  
20 the common interest doctrine or any other privilege, for that  
21 matter, the Court will take a fresh look at that and consider  
22 counsel's arguments relating to that.

23 On the motions to compel, the Court appreciates the  
24 city's willingness to disclose to counsel for the objecting  
25 parties whatever memoranda it shared -- the city's counsel,

1 Jones Day, shared with state officials and would request that  
2 that disclosure be accomplished as promptly as possible.

3 To the extent, however, that the moving parties seek  
4 a ruling from the Court that the mere fact that memoranda or  
5 other documents that would otherwise be protected by the work  
6 product doctrine were prepared pre-retention means that they  
7 are not protected by that doctrine, the Court must reject and  
8 overrule that position.

9 Accordingly, to the extent that the city is  
10 maintaining this privilege as to any of these memoranda that  
11 were attached to Ms. Lennox's e-mail or any other memoranda,  
12 for that matter, the Court will look at them in camera and  
13 ask the city to produce them for that purpose, again, as  
14 promptly as possible.

15 As to the documents that Mr. Wertheimer suggests  
16 were improperly withheld in discovery, this presents a more  
17 challenging request if only because the documents that are  
18 the subject of Mr. Wertheimer's request are not identified,  
19 and so, Mr. Wertheimer, all I can do in that regard is ask  
20 you to identify, again, as promptly as possible, what  
21 documents or range of documents you seek the city to be  
22 compelled to disclose, review that with the city, and to the  
23 extent you can't work it out, we will take a break from our  
24 trial whenever you are ready and work our way through it.

25 MR. WERTHEIMER: Yes, your Honor. I believe you

1       meant the state.

2               THE COURT:   The state.   I did.

3               MR. WERTHEIMER:   Yes.

4               THE COURT:   Thank you.

5               MR. WERTHEIMER:   Thank you, your Honor.

6               THE COURT:   All right.   So are there any other  
7 issues still open before we begin our opening statements?

8               MR. SCHNEIDER:   Your Honor, there is one, and that  
9 is because there has been discussion about the trial  
10 subpoenas that were issued to the governor, the treasurer,  
11 Mr. Baird, and Mr. Ryan.   The last time I appeared before  
12 you, I argued -- I opposed that.   I want the Court to know I  
13 am not going to file a motion to quash.   The governor, in the  
14 spirit of cooperation and because he wants to move this  
15 proceeding along, is willing to testify, and we have made --  
16 we will make all of those state witnesses available.   And we  
17 believe that Monday between 1 p.m. and 3 p.m. the governor  
18 would be available, and we think the other witnesses -- well,  
19 the other witnesses will be available on Monday or Tuesday.

20               THE COURT:   Thank you.

21               MR. DECHIARA:   Good morning, your Honor.   Peter  
22 DeChiara from the law firm of Cohen, Weiss & Simon for the  
23 UAW.   The UAW and the Flowers plaintiffs appreciate the  
24 state's decision to change its position and to produce the  
25 state witnesses.   We just want to be careful to note for the

1 record that there's been no agreement that there should be  
2 any set time for the testimony of the state witnesses,  
3 including the governor. While we realize the governor has a  
4 busy schedule, it is also our view that the governor, perhaps  
5 with the exception of Mr. Orr, is maybe the most important  
6 witness in this case, and given the significance of his  
7 testimony and given the significance of the fact that there  
8 may be documents we may have to examine him on which we have  
9 not yet seen, we would just want to note for the record that  
10 there's been no agreement that his testimony would be limited  
11 to two hours. Thank you.

12 THE COURT: Thank you. Mr. Schneider.

13 MR. SCHNEIDER: As of this point, your Honor, I fail  
14 to see the reason for the objector's argument that the  
15 governor would require to testify for a lengthy period of  
16 time. This Court is well aware of the governor's situation  
17 and who he is in the state. He is willing to do this, but I  
18 think we will have to work with the objectors as to timing.

19 THE COURT: Well, I would certainly encourage that,  
20 but it's not for a witness who appears in any court to  
21 condition his appearance on a specific time limit.

22 MR. SCHNEIDER: He's certainly not doing that.  
23 That's certainly not the case.

24 THE COURT: The UAW certainly interpreted it that  
25 way, and, frankly, I did, too.

1           MR. SCHNEIDER: Well, I'm sorry about that, your  
2 Honor, but I can tell you, as I indicated before, the  
3 governor wants to be cooperative --

4           THE COURT: All right.

5           MR. SCHNEIDER: -- as possible.

6           THE COURT: Good. Thank you. All right. We do  
7 have to get to the issue of the amended joint final pretrial  
8 order. If I read it correctly, one or more of the objecting  
9 parties decided after our final pretrial conference to object  
10 to a certain small number of exhibits, and the state was --  
11 or excuse me -- the city was not willing to allow for a  
12 statement of such a late asserted objection. Is that what  
13 this is about?

14          MR. ULLMAN: Not really, your Honor.

15          THE COURT: Not really?

16          MR. ULLMAN: Not really, not in our view.

17          THE COURT: Oh, so you're withdrawing your  
18 objections?

19          MR. ULLMAN: No. Should I -- may I speak?

20          THE COURT: Please.

21          MR. ULLMAN: No. The issue is not that we're trying  
22 to add new objections. This whole --

23          THE COURT: So you're not trying to add new  
24 objections --

25          MR. ULLMAN: We are maintaining the same --



1           THE COURT: -- so to the extent there are new  
2 objections, we can strike them.

3           MR. ULLMAN: No, your Honor. Let me try to explain.  
4 We had always told the state -- the city that for this subset  
5 of documents -- I believe there are six of them -- that we  
6 were not opposing admissibility in general, but we believe  
7 that they were admissible for limited purposes only to show  
8 that these documents were said, that they were, you know,  
9 created, that they were given to people. We weren't  
10 contesting that they're authentic documents, but we spoke  
11 with Mr. Irwin and told him but at the same time -- that's  
12 why we're not contesting admissibility in general -- we do  
13 not agree that they're admissible for the truth of what they  
14 say. Some of these documents have forward-looking  
15 projections that we don't think there's been an adequate  
16 foundation for, and in our discussions with Mr. Irwin, he  
17 said, "Yeah, we understand that. We're not asking you to  
18 concede to the truth of what's in there." And we said,  
19 "Fine. On that basis" --

20           THE COURT: Well, but hang on. The admission of a  
21 document into evidence or the agreement of the admission of a  
22 document into evidence is not a stipulation to the truth or  
23 credibility of the document. It just means that it meets the  
24 criteria for admissibility under the rules.

25           MR. ULLMAN: And that may be all that's going on

1 here. The reason this came up is because I had heard -- I  
2 was not here at the legal argument yesterday, but I had been  
3 told that your Honor had indicated that if a document did not  
4 have a note on it saying there was some sort of objection, it  
5 would be admitted for any and all purposes, at which point I  
6 said to Mr. Irwin, "Wait a minute. There's a couple of  
7 documents here that we know from our discussions" -- you  
8 know, they're limited for -- we agree they're admissible for  
9 limited purposes only, and we have the right --

10 THE COURT: Well, but what -- for what purpose do  
11 you assert these six documents are not admissible for?

12 MR. ULLMAN: Just for the truth of what's in them,  
13 the hearsay, expert opinion, and then lack of foundation.  
14 Some of these have forward-looking numbers or values in them  
15 as to the amount of the unfunded pension liability, and for  
16 those we're saying we don't disagree that you gave these  
17 documents out, but we're not agreeing that the numbers that  
18 are in there are necessarily true numbers. That's all we're  
19 saying. That was understood from day one with discussions  
20 with Mr. Irwin, and we just wanted to make sure that your  
21 Honor -- that if the document came in, that your Honor would  
22 not assume that everything that was in it on these -- on  
23 these six documents was true. That's all that we cared  
24 about. We don't deny that they were either created, that  
25 they were given to people, and for that purpose we have no

1 problem with admission. And it may have been that we  
2 misinterpreted what your Honor said.

3 THE COURT: I'm having a hard time comprehending  
4 what you're saying, frankly. If a piece of evidence has  
5 hearsay within hearsay --

6 MR. ULLMAN: Um-hmm.

7 THE COURT: -- which I think is what you're talking  
8 about here; right? The document itself is hearsay.

9 MR. ULLMAN: Okay.

10 THE COURT: And it contains hearsay statements.

11 MR. ULLMAN: Yes.

12 THE COURT: Okay. If the document is admitted,  
13 opposing parties waive -- if they agree to the admission,  
14 they waive both hearsay objections. That does not mean that  
15 that party is stipulating to the truth of any of that  
16 hearsay. It just doesn't mean that. All it means is it's  
17 evidence.

18 MR. ULLMAN: Okay. And if, you know, I had been  
19 given a misinterpretation or a misapplication of what your  
20 Honor indicated the other day, then you're right. This is a  
21 moot issue, and there is no problem based on what your Honor  
22 said. I think that's true.

23 THE COURT: Okay. All right. Then in that event,  
24 the Court will enter the amended final pretrial order, and  
25 based on the list of documents that are shown as having no

1 objections, the Court will prepare an order admitting all of  
2 those documents into evidence. Okay. Opening statements.

3 MR. BENNETT: One second, your Honor. Good morning,  
4 your Honor. I'm assuming that you want to hear from us  
5 first, notwithstanding that the order was different in the  
6 other -- in the legal issues proceedings, but, in any  
7 event --

8 THE COURT: Well, you have the burden of proof;  
9 right?

10 MR. BENNETT: Correct.

11 OPENING STATEMENT

12 MR. BENNETT: First of all, I want to make crystal  
13 clear -- many people have in different environments -- that  
14 I'm not going to speak about any arguments that came up in  
15 the context of the legal argument part of the proceedings.

16 THE COURT: Thank you.

17 MR. BENNETT: I appreciate that part, too. And I'm  
18 going to confine myself to the issues -- or the parts of the  
19 eligibility standard and the part of 521(c) that have some  
20 factual disputes that have been identified in connection with  
21 them. And toward the end I do want to spend a minute on the  
22 materiality of facts relating to legislators' or governors'  
23 intent relating to statutes because I think it was not  
24 something that we did cover when we were here before.

25 So, first of all, I'm going to start with the issue

1 of insolvency, and what I'm going to say about that because I  
2 could stand here for hours describing the evidence that is  
3 going to come in on that subject, but I'm not going to do  
4 that -- I'm going to say simply that the witnesses that we  
5 will present on the subject are going to present a mountain  
6 of evidence showing insolvency of the city. Sadly, that  
7 evidence will show that the city is insolvent on every  
8 relevant standard. And, your Honor, there's been at least  
9 intimated in a lot of the papers about the significance that  
10 no expert report has been submitted. Quite frankly, that is  
11 because no expert report is required. This is one of those  
12 cases where the data speaks very clearly and persuasively on  
13 its own -- it needs no gloss -- and that only AFSCME is  
14 objecting on the insolvency point, at least as I read the  
15 papers, itself speaks volumes.

16 I want to say that from the near term perspective,  
17 the city did not run out of cash because -- only because  
18 actions were taken to prevent that from happening. The  
19 evidence will show that if the city just kept on paying debts  
20 as and when they were becoming due, cash would have run out.  
21 The fact that the city stopped doing that is the only reason  
22 why there are positive cash balances. As I said before,  
23 there's no question that if the actions were not taken, cash  
24 would have run out.

25 I will also say that the steps that the city took

1 during past years to pay many of its debts as they become due  
2 didn't turn out particularly well. One of the consequences  
3 you'll see in the evidence and, in fact, a good document to  
4 keep around at all times is the proposal for creditors dated  
5 June 14th. There's a section there that deals with this. It  
6 shows that there were numerous secured borrowings made to  
7 create liquidity in the city in past years when there were  
8 similar cash flow problems. Each and every one of those  
9 borrowings were done on a secured basis, and so the  
10 consequence that we face today is that those borrowings  
11 consume a very significant amount of cash otherwise available  
12 for creditors generally, so that was -- so avoiding a  
13 liquidity problem in the prior periods didn't exactly work  
14 out well from the perspective of many other creditors.

15           Also, as will come into evidence, pension  
16 contributions were deferred during at least the past two  
17 fiscal years with the effect that the underfunding under  
18 anyone's measure -- we don't have to worry about the fight  
19 between the different measures of pension underfunding. It's  
20 greater than it might otherwise have been.

21           Finally, on the insolvency point, you are going to  
22 hear from several witnesses, but most importantly perhaps  
23 Chief Craig, about the fact that the city is failing to  
24 provide basic services to its residents. We don't think  
25 about that as another one of the creditor claims or

1 obligations, but the reality is it's as important as anything  
2 else. As we've indicated before and as the witnesses will  
3 indicate, without solving that problem, there may not be a  
4 city to reorganize.

5 Now, AFSCME makes a few points that are worth  
6 discussing how the evidence will deal with them. First, much  
7 is made over the dispute about the underfunding amount, and  
8 it is asserted that because there's a dispute of the  
9 underfunding amount, the city can't demonstrate it's  
10 insolvent. Well, as your Honor knows, the insolvency test  
11 focuses on cash flow. It focuses on near term and longer  
12 term cash flow type measures, and in that connection, there  
13 are cash flows that will be put into evidence. There's also  
14 a convenient place to find them in the proposal for  
15 creditors. There's different versions with different levels  
16 of updates and different assumptions that are baked into  
17 them, but the line items that talk about pension  
18 contributions your Honor is going to learn don't change very  
19 much whether you use the city's assumptions as to  
20 underfunding amount or the city's calculation of underfunding  
21 amount or the Gabriel, Roeder calculation of underfunding  
22 amount, Gabriel, Roeder, of course, being the actuaries  
23 retained by the pension funds, the pension fund management  
24 themselves, to give them advice. And so your Honor will be  
25 taken through the numbers, and you will find that the

1 contribution amounts, which are the relevant numbers in the  
2 insolvency calculation, don't move around very much  
3 notwithstanding the very different calculations of  
4 underfunding amounts, and the reason for that will be  
5 explained. Mr. Moore of Conway MacKenzie will be the witness  
6 that will cover that area.

7           There's also a little bit of numerical confusion  
8 concerning the percentage of the city's contribution to the  
9 GRS Pension Fund that is attributable to DWSD employees. You  
10 will see in the papers a number bandied around, 62 percent.  
11 Well, actually, the number is the reverse of that. It's 38  
12 to 39 percent. Mr. Orr got that wrong in his deposition. He  
13 corrected it at the end, but, of course, the correction  
14 wasn't cited in the papers. There will be evidence on the  
15 point so there won't be confusion on the point as we go  
16 forward with the numbers.

17           Then AFSCME says that the city deferred sales of  
18 assets, and they talk about two examples. We will  
19 demonstrate, of course, that that is not true. First of all,  
20 the Belle Isle deal, Belle Isle leased to the state in  
21 exchange for the state taking over the maintenance and CAPX  
22 requirements with respect to Belle Isle, never involved the  
23 generation of incremental spendable cash. It did and always  
24 has involved a reduction of the cost on the city to maintain  
25 Belle Isle. And what the evidence will show is that those



1 anticipated savings were included in the projections that  
2 were the basis for insolvency calculations, and they are in  
3 the projections. They're the basis for the proposal for  
4 creditors or at least the lead-up to the proposal for  
5 creditors in the June 14th presentation.

6           It's also very hard for us to understand how anyone  
7 can say that art sales were deferred. It is common  
8 knowledge -- and I suspect we'll figure out a way to get this  
9 into evidence as well -- that there's an attorney general  
10 opinion out there that basically says that the art can't be  
11 sold for creditors. We, unfortunately -- in the absence of  
12 some form of an agreement, there are no sales possible  
13 without a significant change in current management of the  
14 museum or litigation and -- maybe and/or litigation relating  
15 to some of the points made in the attorney general's opinion.  
16 There were no pre-filing opportunities to liquidate art.

17           Next, AFSCME talks about the swap deal, which, of  
18 course, your Honor is familiar with because it's before you  
19 in still another adversary setting in this case. The swap  
20 deal itself, you will hear, does not provide adequate cash  
21 relief, but the transaction hasn't been approved yet. And  
22 there is, unfortunately, no assurance as we stand here today  
23 and certainly as we stood here several months ago, that it  
24 will be done. It turns out that some of the objectors in  
25 this proceeding are also objectors in that one, and so I'm

1 not sure how we're supposed to even count the anticipated  
2 cash flow relief attributable to the swap transaction as  
3 something that could have even affected the city's insolvency  
4 calculations.

5           And lastly, there is the assertion -- and I'm  
6 anxious to hear what the evidence will be to support this  
7 one -- that the appointment of the emergency manager  
8 prevented the city from taking actions designed to raise  
9 revenue and avoid insolvency. Of course, in the briefs that  
10 have been filed, there is no suggestion about exactly what  
11 steps those are that the City Council or the mayor or whoever  
12 else has been displaced in the view of AFSCME have been  
13 planning and anxious to implement that would solve the city's  
14 financial problem. No such actions have ever been specified.  
15 We have no idea where that evidence is coming from. It will  
16 be quite a surprise if there is any.

17           It was for these reasons, the insolvency and the  
18 fact that there really weren't anything left, that the city  
19 or the state could think of to do to address the problems  
20 that the June 14th presentation was put together, and it  
21 proposes a plan that includes significant reductions in the  
22 city's obligations, including bonds, including other post-  
23 employment benefits, including other unsecured claims, and  
24 including pension underfunding claims. Whatever the law  
25 turns out to be concerning protections to be afforded to

1 various claims, there is no law prohibiting the city from  
2 trying to commence negotiations to resolve its financial  
3 problems, and that's what we were trying to do.

4 Now, while we're near this subject, there is an  
5 issue that ripples through actually several of the standards,  
6 which is whether or not the proposal that's included in the  
7 proposal to creditors -- and I'm referring to the materials  
8 that are, I think, between pages 101 and 109 or thereabouts  
9 of that document -- whether that proposal was a -- was close  
10 enough to a confirmable plan of adjustment to qualify for the  
11 purposes of, open paren, one, demonstrating that the city  
12 desires to implement a plan; open paren, two, that the city  
13 was in good faith as part of the good faith negotiations  
14 because they had to be talking about a certain kind of plan  
15 that is asserted; and, three, whether the city was acting in  
16 good faith generally. And I think the proposal for  
17 creditors, that June 14th document, has been admitted into  
18 evidence, again, for all purposes, but very clearly for the  
19 purpose of showing this is what the proposal was that the  
20 city presented as its initial presentation to creditors, and  
21 so it speaks for itself. We can look at it. We don't need  
22 testimony. It's reasonably detailed. In fact, I would  
23 argue your Honor sees disclosure statements, summaries of  
24 plans all the time, and you will see this measures up quite  
25 nicely to the standard that's applicable even in disclosure

1 statements to what a plan should look like. It is -- it has  
2 a classification scheme. It defines treatment for all  
3 classes. It includes a very extensive term sheet for notes  
4 that are proposed to be distributed to creditors, and it is a  
5 plan, your Honor, that for that reason is a plan that could  
6 be confirmable.

7 Now, there is clearly disputes over what law should  
8 be applied by this Court in determining whether or not it  
9 would confirm that plan if it was fleshed out, put into plan  
10 form, and presented to your Honor. I told your Honor in  
11 prior hearings that I doubt that's the way this case is going  
12 to come out, but that's the relevant standard for today.

13 And the reality is is that on the city's very  
14 reasonable view of the law, there is no question that it  
15 could be confirmed. I understand that with respect to the  
16 retiree constituents' views of the law, they say it can't be,  
17 but that doesn't render the proposal inappropriate for  
18 purposes of a Chapter 9 case. We are dealing with issues  
19 that your Honor has heard argument about, is going to  
20 ultimately decide, but the plan hangs together as an  
21 appropriate expression of the kind of debt relief the city  
22 should be able to get based upon one very reasonable view of  
23 the law. We think it's absolutely the right view.

24 The other assertion as to why the plan isn't an  
25 appropriate plan is that it doesn't adequately liquidate

1 claims, and here again they're talking about the pension  
2 underfunding amount. But I think we know both from the  
3 structure of the Bankruptcy Code itself and from many, many,  
4 many other cases that the liquidation of claims is not a  
5 prerequisite to confirmation of a plan. Plans are confirmed  
6 all the time with the treatment specified as the treatment is  
7 specified in the plan in the proposal for creditors that is  
8 not claim size dependent. It's by plan. It makes  
9 distributions based upon pro rata interests in the overall  
10 claims pool. It was designed that way because there is, in  
11 fact, uncertainty concerning the aggregate amount of certain  
12 claims. Frankly, the city believes there's more questions  
13 relating to the size of the OPEB, or other post-employment  
14 benefit, claim pool than there is with respect to the pension  
15 claim pool, but there's uncertainty on these issues. It is  
16 acknowledged there is uncertainty of issues. Those are not  
17 confirmation problems. At least they're not confirmation  
18 problems with some plan structures, and they're certainly not  
19 confirmation problems with the plan structure that was  
20 offered by the city.

21           So for these reasons, that is a plan that is  
22 sufficiently detailed, more detailed than it has been in many  
23 other of the other reported Chapter 9 cases, and it is  
24 appropriate for all purposes as a starting point for good  
25 faith negotiations, demonstration of the city's intent to

1 implement a plan in Chapter 9, and demonstration of the  
2 city's overall good faith in commencing its Chapter 9 case.  
3 And so I think we've dispensed of that component of the  
4 different standards.

5           We now turn to impracticability. Can I have a  
6 second for a glass of water? Thank you, your Honor. Moving  
7 to impracticability, the record shows in numerous places that  
8 the city has many, many issues of bonds outstanding, and  
9 another reason to keep the proposal for creditors nearby is  
10 that toward the back of it -- and I think it's between pages  
11 like 115 and 130, thereabouts -- there is an extensive list  
12 in a type size not so good for people who wear bifocals. I  
13 think you will hear in the evidence, if it's not already  
14 clear from the record, that most of the individual bond  
15 issues do not have indenture trustees as we think of them in  
16 the commercial context or any other equivalent holder  
17 representative. In fact, holders reserve more rights in most  
18 muni structures or assign them to their insurers, to bond  
19 insurers if insurers are involved. And so what you have here  
20 is that in order to compromise principal or interest as well  
21 as many other terms of debt that have to be addressed in  
22 connection with resolving the city's financial problems  
23 either under the proposed plan that was in the proposal for  
24 creditors or in any other plan, there is going to have to be  
25 extensive solicitation, efforts to find relevant bondholders

1 to get the right consents. The bankruptcy process is going  
2 to make it a little bit easier because, of course, it will be  
3 majorities of those who vote, and the solicitation rules are  
4 clearer. Outside of a proceeding you might have to get  
5 everybody in order to implement changes. In fact, you do  
6 have to get everybody with respect to most of the issues.  
7 There are a couple where there might be an exception if the  
8 insurer exercises certain extensive levels of control. The  
9 bottom line is it is an awful mess. There is many, many,  
10 many, many issues, many, many, many holders, and this, of  
11 course, is the definition of impracticability in a lot of  
12 ways in the Bankruptcy Code because the whole reason we have  
13 impracticability was because of New York's case back in the  
14 '70s. New York back then -- the numbers were different;  
15 times have changed -- didn't have materially more and may  
16 have had less bond issues and bondholders than Detroit has  
17 today. And the purpose of the impracticability standard was  
18 to recognize the fact that with that kind of a debt  
19 structure, having good faith negotiations with creditors in  
20 advance of a proceeding in an effort to have an out-of-court  
21 workout were, frankly, pointless or would have been  
22 pointless.

23 And, frankly, for the most part, the objectors don't  
24 disagree with anything I've just said. It's hard to. What  
25 they say instead is that whether -- however negotiations

1 might have been practicable with bondholders, negotiations  
2 were practicable with them, with the -- in some senses, self-  
3 appointed or appointed representatives of particular labor  
4 groups or retirees, and we're going to talk about that in  
5 detail in a second, but we have a point first, which is if  
6 you have a situation where it's admitted or almost  
7 admitted -- and the Court may have to decide -- that  
8 negotiations are impracticable with a huge universe of  
9 creditors but they might be practicable with respect to  
10 another universe of creditors, what do you do? And the  
11 Retiree Committee actually is good about admitting there's  
12 law on this in one of their footnotes, and the law is that if  
13 you've got an impracticability problem, you have an  
14 impracticability problem; that negotiating with the groups  
15 you can groups with are kind of pointless. I think that if  
16 we think about it a little bit, that has to be right because,  
17 of course, if -- let's take a hypothetical that you've got,  
18 you know, a group over here not organized, and then you've  
19 got one bank debt piece, which is clearly organized and you  
20 can clearly negotiate it. Well, you try to do everything you  
21 can with the bank, but at some point the bank is going to say  
22 what's going to happen with them, all those people that you  
23 can negotiate with, because no one ever makes a deal in a  
24 vacuum. And even if you could get all the way to conclusion  
25 with a bank and you still have to file a Chapter 9 case,



1 doesn't that make you start -- effectively start all over  
2 again with the one that was easy to negotiate with? And even  
3 if it doesn't, even if it's possible to negotiate a deal with  
4 both the bank and the city decides this is it, we're going to  
5 make this deal no matter what happens in the Chapter 9 case  
6 that you need for everybody else, you still have to go  
7 through the Chapter 9 case. And waiting to file a Chapter 9  
8 case while you work with the bank and finally reach the deal  
9 that you're going to have with the bank that's going to be  
10 permanent, you've wasted a lot of time because you have to  
11 start a Chapter 11 case and go through that process anyway.  
12 So I submit that the couple of cases that have focused on  
13 this that we cite in our papers and that the Retiree  
14 Committee cites in a footnote have got it exactly right. If  
15 you have an impracticability with respect to a material part  
16 of your capital structure, you have an impracticability  
17 problem, period, so I think by looking at this -- and by the  
18 way, before we go off, I want to say there's one paragraph of  
19 the AFSCME brief that I think is just terribly important on  
20 this. They argue this point a lot, but then they have  
21 paragraph 102 at page 46, and it's only two sentences, so I'm  
22 going to -- three sentences, so I'm going to read the whole  
23 thing. "AFSCME is not suggesting that pre-petition  
24 negotiations could have bound everyone" -- hold that  
25 thought -- "or must have involved all of the city's thousands

1 of creditors." I don't under -- I think that sentence means  
2 we're done because if the pre-petition negotiations couldn't  
3 have bound everyone, how would you get a plan done? And if  
4 it didn't involve all the city's thousands of creditors, how  
5 would you get a plan done? So I think they're conceding that  
6 our situation has to be regarded as impracticable, but they  
7 go on. They say, "Some level of negotiation with principal  
8 creditors could have led the city to a nonbankruptcy  
9 solution." I think that's a non sequitur. If you're not  
10 talking to everyone, you can't possibly have a solution. But  
11 then they go on further, "By way of analogy, Section  
12 109(c)(5)(B) of the Bankruptcy Code contemplates pre-  
13 bankruptcy negotiations with creditors that the  
14 municipality" -- there's a "the" missing -- "intends to  
15 impair, not all creditors." Well, one of the complaints of  
16 AFSCME is that the city intends to impair substantially all  
17 of its material creditors. It has no other choice. So I  
18 suppose there's a circumstance if the city was arguing that  
19 we have a huge group of creditors as to which negotiations  
20 are impracticable, but we're not going to impair them, and we  
21 have another group of creditors that we really can talk to,  
22 and we're going to impair them, if the city said no  
23 discussions, that would be a rather extreme and silly  
24 position. It's just not our case. We need impairment pretty  
25 much across the board. We have proposed impairment pretty

1 much across the board. And in that circumstance, the fact  
2 that huge chunks of the relevant constituencies are not  
3 organized, can't be organized, can't be found, that is to me  
4 the end of the impracticability discussion.

5 But maybe we should go on. Maybe we should try to  
6 figure out whether it was really impracticable to negotiate  
7 with the unions themselves. And, your Honor, I think the  
8 answer to whether or not it was impracticable to negotiate  
9 with the unions themselves -- and I include here the unions  
10 and the other retiree groups -- is, frankly, what happened  
11 when we asked the unions whether or not they could represent  
12 retirees and the other groups or they could represent  
13 retirees, and we have a demonstrative that we'll come back to  
14 and put into evidence later on, but I think it's useful to  
15 pause on, and I think it can go up on -- oh, you have a --  
16 oh, okay. Okay. We have a big one there, and I have a few  
17 that I can hand out to people, so with the Court's  
18 permission --

19 THE COURT: Yes, sir.

20 MR. BENNETT: I think it's also in the -- I think  
21 it's also in the binders. Now, there's a lot of information  
22 on this chart, and I'm not going to try to take us all the  
23 way through it, but I want to zero in on the fourth line of  
24 data, which is the -- which is -- well, first of all, the  
25 third line of data, which says, "Was a letter sent to a

1 creditor?" What that is is a letter that basically asked,  
2 "Are you in a position to represent retirees and which ones?"  
3 You'll see it. It'll be in evidence. And then the next line  
4 is, "Respondent is able to represent retirees," and I'll give  
5 you the key. "X" means they said no, the green check means  
6 they said yes, and the question mark is there was no response  
7 or it's not clear, and your Honor is going to hear some  
8 evidence on that. And so look across the line. I have a  
9 number of your most vigorous objectors who said, "No, we  
10 can't represent retirees," so I'm going to come back to this  
11 in the context of good faith, but let's -- we can start  
12 thinking about it now. What is -- what do you expect of the  
13 city having made a proposal heavily supported, certainly,  
14 again, as standards go in this -- in similar circumstances,  
15 had lots of meetings to explain, answered every question,  
16 every question that was asked at the meetings -- there will  
17 be evidence on that, too -- and your negotiating partner says  
18 to you, in many instances in writing, "We actually can't  
19 represent the people who are impaired by your proposal"? To  
20 say that anything that happened afterwards is not in good  
21 faith, you've got to have a good answer as to what do you do.  
22 What's the next sentence in the dialogue? You're getting  
23 feedback from someone who doesn't have authority to give  
24 feedback if they give you any feedback. By the way, the  
25 bottom line is feedback. "X" means no. There's no other

1 term we need to define. If they say -- if they said --  
2 responded otherwise constructively, which was either "No, but  
3 I might do this," or "Yes, if you make the following  
4 changes," that's okay, but that just came from somebody who  
5 said they don't represent the person who's going to be  
6 affected. What is the next step in a negotiation where the  
7 person who said they're here to negotiate says to you, "We  
8 really don't represent the person who's affected by the plan  
9 we're discussing"? None of the objectors say how that  
10 question is supposed to be answered.

11 The reality is is the city said, "Tell us your  
12 suggestions anyway." And if we got suggestions, feedback, we  
13 would have had to then figure out what to do with it in that  
14 very unusual circumstance that I, frankly, haven't confronted  
15 very often in my career, but we weren't even put to that hard  
16 question because what the other part says is is that -- and  
17 this is more toward the good faith negotiation part than this  
18 one, but as long as I've got the chart up, as the bottom line  
19 indicates, the evidence will show that from this creditor  
20 constituency, not from others -- I'll get to that in a  
21 second -- we received no concrete proposal or comprehensive  
22 feedback. We got a lot of "no," but I'll come to that later.

23 With respect to this part, again, impracticability,  
24 AFSCME cites results of past collective bargaining as an  
25 example of negotiations with unions that have succeeded.

1 That doesn't surprise me in the slightest, but there's also  
2 no evidence and I don't think there will be any that those  
3 past discussions began with unions disclaiming power to  
4 bargain on behalf of the relevant constituency. As the  
5 evidence will demonstrate, that's how these discussions did.

6 So the bottom line, again, with respect to this  
7 part, is even if -- and it's not -- the standard for  
8 impracticability of negotiations is impracticability with  
9 every major constituency, I think the fourth line of this  
10 chart demonstrates that negotiations were impracticable with  
11 the retiree side, and they were impracticable with the  
12 bondholder side.

13 Good faith negotiations. Again, this is a question  
14 I don't think we have to reach because I think we've  
15 demonstrated that those kinds of negotiations were  
16 impracticable, but we tried really hard anyway. The evidence  
17 will show that we presented the June 14th plan. Mr. Buckfire  
18 of Miller Buckfire, who was integral to all the negotiations,  
19 but others, Mr. Moore, Mr. Malhotra, people

20 you will hear from, they also extensively participated  
21 and will testify about what happened in the rooms. The city  
22 told the creditors essentially the following. The city would  
23 have discussions with all parties willing to speak for the  
24 city for about a month after the June 14th presentation so  
25 that the city could listen to people and figure out if there

1 was an out-of-court solution possible for this enormously  
2 complex and dire circumstance. The city representatives  
3 asked for feedback, including proposals that the creditors  
4 would accept if they weren't going to accept the city's  
5 proposal. And the city said in writing and separate -- and  
6 verbally that it would evaluate what it heard during the  
7 following month, during the week beginning July 15th, 2013,  
8 and decide what came next. It's conceivable -- I think  
9 people would say they doubted it would happen -- that one of  
10 the things that would have come next were consensual  
11 negotiations on the effort to build some kind of plan. That  
12 could have commenced.

13 THE COURT: You said July. Did you mean June?

14 MR. BENNETT: No. July 15th was the evaluation  
15 week.

16 THE COURT: Oh, okay.

17 MR. BENNETT: The June 14th proposal and July 15th  
18 evaluation week, meetings in the middle. I'll have a  
19 timeline at some point, and you'll see how this fits  
20 together.

21 THE COURT: Okay.

22 MR. BENNETT: So one of the things that might have  
23 happened next would have been negotiations on a consensual  
24 plan, but if the -- after the month of discussions and after  
25 the evaluation week the city could not see a path to an out-

1 of-court restructuring that could be implemented outside of  
2 court, a Chapter 9 case was absolutely a possibility. No one  
3 was shy about that. And, frankly, it should not be  
4 surprising to anyone that the evidence shows that work on  
5 both contingencies was proceeding throughout this entire  
6 period. Much is made of the fact that there's contingency  
7 planning going on for a Chapter 9 case. Absolutely there  
8 was. It would have been irresponsible not to. By the way,  
9 nothing in the Jones Day pitch is inconsistent with this way  
10 of organizing a case. And there's a lot of complaints about,  
11 well, people thought they had to keep a record, make a  
12 record. Absolutely they have to keep a record and make a  
13 record. Making a record of out-of-court steps taken in a  
14 Chapter 9 negotiating process is just sensible when everybody  
15 knows, based upon the play book executed in the last six or  
16 seven major cases have involved vigorous objections to  
17 eligibility by bondholders and labor unions, depending upon  
18 the case which, sometimes both, and in every single one of  
19 those cases, the judge has to go through pages and pages and  
20 pages about what happened during the out-of-court phase to  
21 determine whether people were in good faith. So courts  
22 through their opinions have sent a message to people who are  
23 serious about Chapter 9 restructurings. Keep records, and we  
24 did.

25           There is a lot of criticism in the papers that there



1 were instances where the city said these are not negotiations  
2 or particular meetings were not negotiations. I confess that  
3 this implicates an area of law that I'm not tremendously  
4 familiar with. It has to do with collective bargaining. As  
5 the evidence will show, the collective bargaining was  
6 suspended as a result of a statute passed, and there was a  
7 clear concern by the city that they were not going to waive  
8 the -- or reverse the suspension of collective bargaining and  
9 all of the baggage that came with that. However, we don't  
10 really have to deter ourselves much over that incident  
11 because it's admitted by the objectors that the city sought  
12 feedback. The evidence will show that. It's admitted that  
13 there were, quote, discussions, close quote, and by the way,  
14 the leading case that people cite as the -- I think it's  
15 Endicott Schools case that is cited for the proposition of,  
16 you know, what is a nonnegotiated process or absence of  
17 negotiations. That case talks about absence of discussions.  
18 That's the actual quote if you go back to the case itself.

19 So, in any event, there is no dispute that dialogue  
20 was something that was encouraged and not discouraged.  
21 Nobody said we don't care what you think. Never happens;  
22 evidence will show never happens.

23 Now, again, assuming for a second that what the city  
24 did in the negotiations has any relevance at all given the  
25 clear impracticability in this case, what is required of the

1 city in good faith negotiations -- and I intimated that when  
2 we started talking about the chart -- is informed what  
3 creditors -- by what creditors said and did. Okay. Mr.  
4 Buckfire will testify about some of that being especially  
5 careful not to talk about proposals that other people made  
6 because they were made with an intent that they be kept  
7 confidential, but we got permission at least in one instance  
8 to talk about the fact that a proposal was made. And what  
9 Mr. Buckfire is going to tell the Court is that the proposals  
10 that the city got back were proposals that basically said,  
11 "Our position is better than everybody else. We should do  
12 better than everybody else," and they were, frankly,  
13 completely insensitive to the overall problems that the city  
14 faced. Again, the fact that we did get proposals from people  
15 other than the labor negotiators is going to be --  
16 Mr. Buckfire will testify to it, but there's a letter in  
17 evidence, and I don't have the number. I forgot to put it on  
18 this morning. There's a letter in evidence -- a cover letter  
19 to a proposal that came from three major insurers in the pre-  
20 filing period. And, your Honor, that demonstrates that a  
21 party that's represented by qualified professionals, as a  
22 number of the labor/retiree constituents were, knew exactly  
23 what you're supposed to do when you receive a proposal and  
24 you don't like it. The way you -- the way you respond to a  
25 proposal and you don't like it is you send back something

1 that you do like, and that's how a negotiation gets started.  
2 Whether it would have worked or not is a different question.  
3 The point is is that it wasn't a mystery to anybody how to  
4 start a negotiation if someone really wanted to start one.

5           What did labor do besides respond maybe we're not  
6 the right person to talk to, which is a problem in and of  
7 itself? Well, here the UAW's papers are particularly  
8 instructive, and in many places in their papers, particularly  
9 their supplemental objection -- I think it's also in the  
10 pretrial brief; I'm just not remembering that as clearly  
11 today -- the UAW says, "Well, of course we weren't going to  
12 say yes to any modifications of retiree benefits or pension  
13 benefits in the pre-filing scenario because we had a  
14 constitutional guarantee. Any proposal that doesn't pay  
15 these in full and does not impair retiree benefits is a  
16 proposal we cannot accept," or, "we will not accept." I  
17 think it says both those things in different places.

18           So, again, I think we have to ask the most crucial  
19 question in evaluating the city's good faith. When you get  
20 back a response that says, "We're never going to agree to  
21 anything but nonimpairment," what exactly is the city  
22 supposed to do next? What's the next step in that  
23 negotiations? "Gee, we were just kidding. We found the  
24 money in a mattress. We'll do that"? I don't think that's  
25 the right response. I don't think there is a right response.

1 I think at that point you can determine that negotiations  
2 have failed and they're not going to succeed.

3 The Retiree Committee goes even further in their  
4 papers, their pretrial brief. They say that negotiations  
5 were not in good faith because they included an impairment,  
6 meaning the city wasn't in good faith because we didn't agree  
7 with them from day one. Okay. Again, I ask the question,  
8 what exactly -- if anyone is going to contend that the city  
9 was in bad faith negotiations and got that response, what  
10 exactly were they supposed to do next in the negotiations  
11 that would have helped matters?

12 And as I said before, many retiree groups said,  
13 "We'd love to talk to you, but we don't represent the  
14 relevant people."

15 Clearly, your Honor, we received many requests for  
16 additional information. You will see some interesting charts  
17 that show what was in the data room, at least in terms of  
18 volumes, how the data room is populated. The evidence will  
19 show that the city did its best to comply with information  
20 requests. I'm absolutely certain that no one was completely  
21 satisfied with what the city gave them. In some instances,  
22 that's because the city doesn't always have everything that  
23 people want. In some instances, I suspect it's -- we will  
24 find that -- to the end of this case we will not find -- we  
25 will find certain people who will never agree that they've

1 gotten everything that they want or they're satisfied with  
2 the information they received. It's a hard problem, but the  
3 evidence will show that the city created a database, worked  
4 really hard to populate it, populated it with enormous  
5 amounts of information, and did not withhold information as a  
6 basis to obtain a negotiating advantage.

7           Final point with respect to this section. In almost  
8 all the papers -- and I want to -- it could be all -- there  
9 is a statement quoted by Kevyn Orr concerning the financial  
10 and operating plan at a meeting to discuss the financial and  
11 operating plan, which is not the proposal for creditors. The  
12 financial and operating plan is a document required by  
13 statute to be filed 40 days -- 45 days after his appointment.  
14 It's about facts, and he's reporting facts. And someone  
15 asked him about negotiating the financial and operating plan,  
16 and he said, "This is not something to negotiate. This isn't  
17 a plebiscite. This is a report. I'm supposed to file it."  
18 So that quote, which I think the objectors would have you  
19 think applied to the restructuring plan, and it does not, did  
20 not, and it applies to something completely different, and I  
21 think the evidence will show that.

22           For the foregoing reasons, I think the city did act  
23 in good faith in all of the negotiations that it conducted.  
24 Those negotiations were unsuccessful and, thus, that  
25 prerequisite for filing a Chapter 9 case and being eligible

1 for relief has been met.

2 I'm now going to turn to good faith generally, spend  
3 a little time on it, 921(c). Here again, I want to borrow  
4 AFSCME's papers because they're just very instructive and  
5 really help us with this. Paragraph 109 on page 48, "The  
6 relevant considerations regarding good faith under Chapter 9  
7 include," and they point to five points out of the Stockton  
8 case. I'll accept them. Number one, whether the city's  
9 financial problems are of a nature contemplated by Chapter 9.  
10 The evidence will show that if Detroit's financial problems  
11 are not the financial problems of the nature contemplated by  
12 Chapter 9, I don't know what city's is, so we think we will  
13 satisfy that one very easily. Number two, whether the  
14 reasons for filing are consistent with Chapter 9. I think  
15 the form and substance of the plan that was proposed and,  
16 frankly, everything that the city has been saying about it  
17 are indicative that the city is trying very hard to use the  
18 powers subject to the limitations included in Chapter 9 to  
19 effectuate a financial restructuring for the city. I don't  
20 think we'll have any difficulty demonstrating that with the  
21 evidence. Number three, the extent of the city's pre-  
22 petition efforts to address the issues. Here I want to pause  
23 and put on a timeline, and there's -- it's really long, so  
24 there's two pieces, but for this purpose it's the first piece  
25 that's the most relevant.

1           THE COURT: Let me ask you to pause for just a  
2 second. We should have the record reflect what exhibit  
3 number that chart is.

4           UNIDENTIFIED SPEAKER: It's Exhibit Number 36.

5           MR. BENNETT: I have better. They'll try and put it  
6 up, but I also have some copies of it. Here's what I'm going  
7 to do. I'm going to distribute the first piece now, with the  
8 Court's permission, and the second piece in a minute, so --  
9 after I get through this, so here's the first piece. Again,  
10 I think everyone has seen this already. If you don't have  
11 it, it's okay. Everyone else is going to have it in a  
12 second. Obviously in a bunch of ways this chart summarizes  
13 lots and lots of evidence that is going to go into the  
14 record, but what is going to be seen in the record was that  
15 it wasn't a bunch of people up at night on June 13th working  
16 on a presentation of a plan for June 14th. The efforts to  
17 address the -- the pre-petition efforts to address the issues  
18 stretch probably before December 21, '11, but I think at  
19 least, as I understand the history and as the evidence will  
20 certainly show, no later -- excuse me -- no later than  
21 December 21, 2011, December 2011, a number of people within  
22 state government and city government started focusing on the  
23 fact that the Detroit financial situation was very serious  
24 and had to be addressed. And there were a number of efforts  
25 that were attempted all through 2012 to try to grapple this

1 problem -- with this problem short of requiring concessions  
2 from creditors, short of Chapter 9. Kind of everything else  
3 you might think of doing was done by a large number of really  
4 devoted and qualified people. Regrettably, it all failed,  
5 and -- but the part about -- you know, this first chart,  
6 which covers almost a year and a half on one page -- it was a  
7 lot of time and a lot of effort in a search for alternative  
8 solutions. So forgetting the near-in -- what happened in the  
9 June and July time frame, which we'll get to in a second,  
10 the -- it is clear that there was a tremendous amount of time  
11 and effort considering the issues.

12           Next is the fourth item in the AFSCME list, the  
13 Stockton list, the extent that alternatives to Chapter 9 were  
14 considered. I think alternatives broadly construed include  
15 all of this, but then we'll turn to the time frame -- and all  
16 of a sudden -- we just got this one up -- the time frame of  
17 June and July, which we've blown up because so much happened,  
18 onto its own separate chart, so let me pass this one out.

19           THE COURT: So, ma'am, what's the number of that one  
20 that you're just now taking down?

21           UNIDENTIFIED SPEAKER: They're both Exhibit 104.

22           THE COURT: Oh, both 104. Okay.

23           MR. BENNETT: And because so much more happened, at  
24 least in terms of dates and places, in the June and July time  
25 frame, we've blown that one up so that the last two months



1 are their separate page. And June was devoted to heavily  
2 trying to figure out whether the last round of possible  
3 alternatives, any conceivable kinds of out-of-court  
4 restructuring, could work, and what the evidence will show is  
5 that on this page, which shows all kinds of meetings and all  
6 kinds of different interactions with creditors, a concerted  
7 decision was made to exclude meetings with individual  
8 creditors or individual creditor representatives because it  
9 wouldn't be readable anymore, so this is just organized  
10 meetings with different groups for different specific  
11 purposes. The other key to interpretation is when it says  
12 "nonunion," it means the bonds, so the union -- for  
13 purposes --

14 THE COURT: Means what, sir? Pardon? It means  
15 what?

16 MR. BENNETT: The bonds. "Nonunion" means --

17 THE COURT: Bonds.

18 MR. BENNETT: -- the bonds and other borrowed money  
19 because there is a collection of notes involved in that side  
20 of the case as well. Where it says "union," it's really the  
21 retiree representatives, which at the time were predominantly  
22 union. And so what this demonstrates -- again, it may be  
23 part of the good faith piece, too, but for purposes of the  
24 fourth prong of the Stockton test, I would say both of these  
25 are relevant, both the long-term assessment of alternatives

1 that were short of debt restructuring, then the close-in  
2 effort to figure out whether there was any conceivable way to  
3 get something accomplished out of court. It is perfectly  
4 clear that there was an extensive effort to evaluate every  
5 conceivable alternative that anyone could think of.

6 And then the last factor, factor five, whether the  
7 city residents would be prejudiced by Chapter 9 relief. As  
8 we said in argument last week -- and the Court will hear  
9 through extensive evidence -- and it's a really important  
10 part of the case both for purposes of eligibility and for  
11 everything that will follow -- the residents are dramatically  
12 prejudiced by denying Chapter 9 relief. Many of the problems  
13 the city confronts in providing services to its residents is  
14 because so many of its tax dollars are devoted to dealing  
15 with bonds and other legacy liabilities. That's the problem.  
16 The taxpayer in Detroit puts up a dollar and gets back --  
17 right now the number is something -- right now the number is  
18 something like 58 cents, and the projections show it could be  
19 some day 35 cents. That's an unstable situation. It's not  
20 working now, it's not going to work in the future, and it has  
21 to be changed.

22 The other side of the coin. Very often the first  
23 reaction in cases like this is raise taxes. The evidence  
24 will show -- it's summarized, by the way, in the June 14th  
25 proposal -- that the taxes in Detroit are already the highest

1 in any municipality in Michigan; that we're already having  
2 enforcement problems. The city is already having enforcement  
3 problems with respect to property taxes; that the property  
4 tax assessments may be too high, not too low, indicating that  
5 that revenue source is stressed as well. There's nothing  
6 left to do here. There is no revenue solution. So we have  
7 come to a case, which is not necessarily like other Chapter 9  
8 cases, where we have a very finite revenue pool, and it just  
9 isn't enough to provide services and to pay debt, and, thus,  
10 Chapter 9 is more needed here than in any other scenario you  
11 can possibly think of. The evidence will show that.

12 Last topic, and this gets a lot more technical, but  
13 this is responsive to your Honor's suggestion that we had to  
14 deal with a disputed issue of fact, and that was the  
15 motivation for the inclusion of appropriations provisions in  
16 PA 436. Your Honor, I think the following is intended to  
17 really indicate that that question isn't material, but I  
18 think it's also -- when we did the research, we found that  
19 it's also not a legitimate question for judicial review, so  
20 I'm going to give you some citations, and I'm going to read a  
21 very few quotes, and your Honor is clearly going to find more  
22 when you look at this question.

23 In the State of Michigan, frankly, I think in other  
24 places, et al. -- other places as well, the judiciary is not  
25 supposed to engage in guessing about the legislature's

1 intent. The leading case about this turns out to be a  
2 referendum case in Michigan. It's called Michigan United  
3 Conservation Clubs versus Secretary of State. It's found at  
4 630 N.W. 2d 297. Michigan United involved a review of a  
5 Court of Appeals decision -- I think it's called the Court of  
6 Appeals here -- a Court of Appeals decision that held, in  
7 fact, that the -- that an appropriations provision in gun  
8 control legislation was not going to prevent that legislation  
9 from being subject to a referendum, and the Supreme Court  
10 reverses and says that that -- that the inclusion of that  
11 provision is going to insulate that statute from the  
12 referendum process. And along the way, the Court was not  
13 fractured in result but was fractured a little bit in  
14 reasoning. There's a collection of -- I think it's three  
15 concurring opinions. There's one judge who writes a  
16 dissenting opinion. I think it's just one, but I'm not a  
17 hundred percent positive about that. And so the lead -- the  
18 first concurring opinion has this to say. "This court has  
19 repeatedly held that courts must not be concerned with the  
20 alleged motives of a legislative body in enacting a law, but  
21 only with the end result - the actual language of the  
22 legislation." And then there's a whole series of cases that  
23 are cited to support that proposition that I won't read the  
24 citations in the record unless your Honor wants them.

25 The next concurring opinion, Judge Corrigan's,

1 quotes from Justice Cooley's constitutional law thesis or  
2 textbook. It looks like it may be a textbook. And the  
3 quote, I think, is also instructive. It's a little bit  
4 longer. It says the following: "to make legislation depend  
5 upon motives would render all statute law uncertain, and the  
6 rule which should allow it could not logically stop short of  
7 permitting a similar inquiry into the motives of those who  
8 passed judgment. Therefore, the courts do not permit a  
9 question of improper legislative motives to be raised, but  
10 they will in every instance assume that the motives were  
11 public and benefitting (sic) the station. They will also  
12 assume that the legislature had before it any evidence  
13 necessary to enable it to take the action it did take."

14           Then, your Honor, the next case you would find if  
15 you looked at this is Houston versus Governor, which is a  
16 2012 case. There's a longer -- 491 Michigan 876, 810 N.W. 2d  
17 255. And right near the front of the opinion there's a  
18 paragraph. I'm only going to read two parts of the paragraph  
19 to save time. "There is nothing that is relevant in this  
20 regard" -- that's in terms of interpreting a statute -- "that  
21 can be drawn from the political or partisan motivations of  
22 the parties." I'm going to skip a sentence. "Moreover, this  
23 court possesses no special capacity and there are no legal  
24 standards by which to assess the political propriety of  
25 actions undertaken by the legislative branch."

1           Now, of course, much of this makes sense because one  
2 of the problems we scratched our heads about when we got back  
3 to think about how we would address your Honor's question is  
4 there are a whole bunch of legislators in two Houses that  
5 conceivably had all kinds of different reasons for supporting  
6 the appropriations. It could well be that most of them put  
7 the appropriations there because they really thought they  
8 needed the money even if some thought they were putting it  
9 there because it was a problem relating to the referendum  
10 process. I will tell you a very, very persuasive example of  
11 the hazards of trying to figure out the intent of statutes  
12 was impressed upon me by a law school, an example I learned  
13 in law school, which was about the age 55 -- or the 55-mile-  
14 per-hour speed limit, and it -- research turns out to show  
15 that the purpose of that speed limit was to save fuel, and  
16 the reason that it wasn't increased for a long time is  
17 because it saved lives. And so also the purpose of  
18 legislation actually can change over time or the reason why  
19 it stays there, so I think it's a hazardous inquiry. I don't  
20 think we know where to start. I don't think we can drag all  
21 the legislators in here and ask them all, and I think the  
22 only other evidence you're going to see about this is,  
23 frankly, inadmissible hearsay.

24           Maybe more importantly than this, I think I  
25 indicated to your Honor in argument last week that I didn't

1 think there was any consequence to a determination by this  
2 Court that the appropriation provisions might prevent a  
3 referendum. I said that the statute wouldn't be  
4 unconstitutional. It just would be subject to referendum.  
5 Well, it turns out in the Michigan United case, one of the  
6 concurrences goes back and gives everybody the history of  
7 what happened in that case, and so how did that case wind up  
8 in court to begin with? And it wound up in court because the  
9 persons, the group that wanted to have a referendum went out  
10 and got the required number of signatures, went to the  
11 appropriate office where the election is going to be held,  
12 and the first response was no referendum because of the  
13 provisions, and then they went to court to test it. So I  
14 think we're in a situation where, frankly, the only  
15 circumstance where this issue of whether or not the  
16 appropriate -- whether or not the appropriation provisions  
17 are in there for an appropriate purpose would conceivably  
18 come up is when a person or organization desiring a  
19 referendum within the time specified by the statute -- and it  
20 could conceivably have run; I couldn't figure that out --  
21 actually collects the signatures, goes down to the  
22 appropriate place and tries. That never happened.

23           It also appears that even if a group or person  
24 doesn't do that, there is an initiative process, which is  
25 different from a referendum process, which they could have

1 triggered, and that process is not dependent in any way on  
2 whether or not there's an appropriation provision in the  
3 relevant statute.

4 And, finally, I think it was pointed out when we  
5 were together last that the PA 436 contains a severability  
6 clause, so what's left to have happen at this point is if  
7 that provision is somehow inappropriate and has to be  
8 stricken for some legally cognizable reason, the rest of the  
9 statute is still there. So I would say, again, summarizing  
10 from where I started, there's two points here. One is is  
11 that I think your Honor has asked for an inquiry that is not  
12 only impractical, it's not one for courts, but, in any event,  
13 it's not material to anything because it doesn't lead us  
14 anywhere that would change the result that we have PA 436 or  
15 at least every single one of its provisions with or without  
16 the appropriation provision to apply, and it's not upset by  
17 reason of the possibility that a referendum could have been  
18 attempted in some circumstances where one never apparently  
19 has been attempted.

20 With that, if you have no more questions, I think  
21 I'm done.

22 THE COURT: Thank you.

23 MR. BENNETT: Thank you. I've been asked to offer  
24 104 for demonstrable purposes only because it would not be on  
25 the relevant lists.



1           THE COURT: Is there any objection to 104 for  
2 demonstrative purposes only? All right. The Court will  
3 admit it for that purpose.

4           (Debtor's Exhibit 104 received at 11:25 a.m.)

5           MS. LEVINE: Good morning, your Honor. Sharon  
6 Levine, Lowenstein Sandler.

7           THE COURT: Let's just have the record clearly state  
8 this. Does the State of Michigan wish to make an opening  
9 statement on the issue of the city's eligibility?

10          MR. SCHNEIDER: No, your Honor. However, we may  
11 wish to make a closing statement.

12          THE COURT: Thank you. You may proceed.

13          MS. LEVINE: Thank you, your Honor. Sharon Levine,  
14 Lowenstein Sandler, for AFSCME. I'm actually here in the  
15 role of emcee. As with the oral arguments, we have agreed to  
16 work together to try and not duplicate efforts and to make a  
17 cohesive presentation, so just to give your Honor a little  
18 bit of an understanding, the Retirement System is going to,  
19 in essence, go first, spend about 20 minutes going through  
20 the timeline as we see it. Following that, the Retired  
21 Detroit Police Members Association will react to the city's  
22 final portion of their statement and also to their particular  
23 issues as reflected in the timeline and apply it to the  
24 facts. The UAW, the Public Safety Unions, the Retired  
25 Association Parties, and AFSCME will each spend just a few

1 minutes indicating how we see any additional facts or how the  
2 facts apply to our particular situations, and then the  
3 Retiree Committee probably for 20 or 30 minutes will give a  
4 global overview of applying the facts that came out in the  
5 timeline to the law. Thank you.

6 THE COURT: Okay. Well, do you think it's okay with  
7 your group if at a convenient break around noon we take our  
8 lunch break?

9 MS. LEVINE: That would be great.

10 THE COURT: Okay.

11 MS. GREEN: Your Honor, can I move the -- oh, I'm  
12 sorry.

13 THE COURT: Yes. Can we arrange to move that easel,  
14 please? You can try.

15 MS. GREEN: Your Honor, Jennifer Green on behalf of  
16 the Retirement Systems.

17 THE COURT: Be sure you speak right into the  
18 microphone even though you've angled the lectern there.

19 OPENING STATEMENT

20 MS. GREEN: As Sharon mentioned, we have put  
21 together a slideshow presentation of the timeline. We  
22 believe that these facts will later be used to support  
23 certain legal arguments that we will be raising throughout  
24 trial regarding the fact that Chapter 9 was a foregone  
25 conclusion well before any creditor negotiations occurred;

1 that Chapter 9 was filed in bad faith to circumvent the  
2 pension clause, and we submit, respectfully, we disagree with  
3 the city's assertion a moment ago that Chapter 9 was a mere  
4 contingency, and our assertion is that it really was a  
5 foregone conclusion before any of the creditor negotiations  
6 ever occurred, and with that I will begin.

7           You may ask why we're going back this far to 2011,  
8 but at his deposition, your Honor, Governor Snyder testified  
9 that this has been a highly structured process for close to  
10 three years, so we begin in January 2011 when Richard Snyder  
11 takes office as the governor of the State of Michigan.

12           Shortly thereafter, just three months later, the  
13 governor signs into law what we now refer to as PA 4. The  
14 legislation makes its way through both Houses within just 34  
15 days. February 2012, Stand Up for Democracy files with the  
16 Secretary of State a petition to invoke a referendum on PA 4.  
17 Just days later, within -- actually, within three days of  
18 Stand Up for Democracy's petition, discussions begin  
19 regarding ways to insulate PA 436 -- or what will become PA  
20 436 eventually from referendum. There are notations that  
21 discussions were had with Andy Dillon, the treasurer of the  
22 State of Michigan's office, and there are notes about Miller  
23 Buckfire are going to follow up with Andy directly about the  
24 process for getting this to the governor and a notation that  
25 the cleanest way to do all of this is new legislation that

1 establishes a board and includes an appropriation for a state  
2 institution. If an appropriation is attached, it concludes,  
3 then the statute is not subject to repeal by the referendum  
4 process.

5 In April of 2012, the city enters into the consent  
6 agreement with the State of Michigan. Shortly thereafter,  
7 Heather Lennox of Jones Day and Ken Buckfire of Miller  
8 Buckfire purportedly meet with Governor Snyder on June 6th,  
9 2012, to discuss the Detroit -- the City of Detroit's  
10 financial crisis and issues related to potential Chapter --  
11 or Chapter 9 bankruptcy.

12 Prior to the meeting, in the e-mail that we  
13 discussed earlier and that I quoted for you earlier during  
14 oral arguments, there is a notation that Mr. Buckfire  
15 suggested that all the memos be put together, the ones that  
16 were done for Andy. A list of those memos were compiled, and  
17 three of those we think are pertinent to some of the issues  
18 at trial in this case. One of the memos was regarding a  
19 summary and comparison of PA 4 and Chapter 9. One was a  
20 memoranda on constitutional protections for pension and OPEB  
21 liabilities, and a third memo was analysis of filing  
22 requirements of Section 109(c)(5) of the Bankruptcy Code, in  
23 particular, negotiation being impracticable and negotiating  
24 in good faith.

25 Two weeks after the meeting with Governor Snyder,

1 Miller Buckfire is engaged by the State of Michigan to  
2 perform an analysis and review of the city's financial  
3 condition. Shortly thereafter, Ken Buckfire testified that  
4 after he got this engagement, he started receiving phone  
5 calls from law firms seeing if he would be interested in  
6 helping them get inserted in --

7 THE COURT: I need to interrupt you for a second.

8 MS. GREEN: Am I going too fast?

9 THE COURT: Yes.

10 MS. GREEN: I was trying to get done by noon. I was  
11 trying to get done by noon because you said you wanted to  
12 break at noon.

13 THE COURT: I really want to follow what you say,  
14 so --

15 MS. GREEN: I will slow down.

16 THE COURT: -- I need you to slow down.

17 MS. GREEN: I knew I only had 30 minutes, so I was  
18 trying hard.

19 THE COURT: Well, we don't have to stop right at  
20 noon.

21 MS. GREEN: Okay. I will slow down.

22 THE COURT: But slow down for me by about 50  
23 percent.

24 MS. GREEN: Wonderful. I get this a lot, so I know  
25 I'm a fast talker. The discussion continues. Mr. Buckfire

1 testified that Corrine Ball had wanted him to meet one of her  
2 partners, who was successful in a Chapter 9 case. This is in  
3 2012. In October of 2012, PA -- before PA 4 is even rejected  
4 by the voters, the Treasury Department and the Governor's  
5 Office begin discussing creation of a new emergency manager  
6 statute just in case the referendum is passed. Howard Ryan,  
7 who is the 30(b)(6) witness for the State of Michigan, will  
8 testify to that. Shortly thereafter, November 6th of 2012,  
9 the Michigan electorate rejected PA 4.

10 In December Senate Bill 865, which would eventually  
11 become PA 436, was introduced in the Michigan legislature.  
12 The final version is adopted by both Houses just 14 days  
13 later on December 15th, and around that same time the  
14 treasurer commences a preliminary review of the city's  
15 finances under PA 72 and determines that a serious financial  
16 problem exists in the City of Detroit.

17 At the end of December, the governor of Michigan  
18 signs PA 436 into law, submits it to the Secretary of State.  
19 The entire process for PA 436 took only 26 days, and it is  
20 insulated from public referendum because it contains what the  
21 objecting parties submit is a minor appropriation of \$5.8  
22 million, which is less than .009 of the state budget, and  
23 below we have the citation from the exhibit that sets forth  
24 the amount of the state budget.

25 In connection with the PA 436 appropriation, the

1 state 30(b)(6) witness testified at his deposition that he  
2 was aware that the appropriation was included for the purpose  
3 of insulating it from referendum. He was asked the question,

4 "Do you recall when that provision of the  
5 legislation was added to the draft bill?"

6 Pretty early on, I believe. It was quite early,  
7 maybe from the inception."

8 He was then asked, "Based on your conversations  
9 with the people at the time, was it your understanding that  
10 one or more of the reasons to put the appropriation language  
11 in there was to make sure it could not -- the new act could  
12 not be defended by a referendum?" He answered, "Yes."

13 "Where did you get that knowledge from?

14 Well, having watched the entire process unfold  
15 over the two -- past two years.

16 The governor's office knew that was the point of  
17 it?

18 Yes.

19 That your department" -- his is the treasury --  
20 "knew that was the point of it?

21 Yes."

22 In January of 2013, Miller Buckfire was reengaged,  
23 this time by the City of Detroit, to continue its evaluation  
24 of the city's financial condition. Mr. Buckfire was then  
25 asked by Treasurer Dillon to make arrangements for the city

1 and state officials to meet and interview Jones Day and seven  
2 other law firms that were interested in serving as  
3 restructuring counsel.

4           The day before the pitch presentation with the City  
5 of Detroit, Kevyn Orr, who attends the pitch, receives an e-  
6 mail recounting conversations with Mr. Buckfire -- Mr.  
7 Buckfire will be testifying live during this trial -- and  
8 listed are the questions that will be asked the following day  
9 at the pitch. They all relate to Chapter 9. "Given the  
10 issues that Detroit faces, how can they address them outside  
11 of Chapter 9?" is the first, but all the rest are, "Under  
12 what circumstances should Chapter 9 be used?" "How would one  
13 execute a low-cost fast Chapter 9?" "Given Chapter 9  
14 experience, what went wrong with JeffCo and Orange County?"  
15 And at the bottom, "If Miller Buckfire finds a way to  
16 monetize assets and create liquidity, how would that impact  
17 eligibility?"

18           The next day on January 29th, Jones Day presents its  
19 restructuring strategy to the city and state officials, and  
20 it explains that while out-of-court solutions are preferred,  
21 they conclude they are extremely difficult to achieve in  
22 practice. They note that Chapter 9 can create negotiating  
23 leverage negotiating with the backdrop of bankruptcy, which  
24 we submit is not good faith.

25           They further conclude in their strategy that an out-



1 of-court plan should contemplate the possibility of Chapter 9  
2 because it creates leverage, you can negotiate in the shadow  
3 of Chapter 9, and it helps bolster your eligibility and your  
4 success in a Chapter 9 by establishing a record of seeking  
5 creditor consensus.

6           There are notes on the slide that state, "A good  
7 faith effort to pursue an out-of-court restructuring plan  
8 will establish that clear record and will deflect any  
9 eligibility complaints based on alleged failure to negotiate  
10 or bad faith. If needed, though, Chapter 9 could be used as  
11 a means to further cut back or compromise, quote, 'accrued  
12 financial benefits otherwise protected under the Michigan  
13 Constitution.'"

14           The next day Richard Baird, who's Governor Snyder's  
15 consultant, reaches out to Jones Day to inquire about hiring  
16 Kevyn Orr as the emergency manager. The following day,  
17 Mr. Orr calls PA 436 a clear end-run around the prior  
18 initiative that was rejected by the voters in November and  
19 also comments, "So although the new law, PA 436, provides the  
20 thin veneer of a revision, it is essentially a redo of the  
21 prior rejected law and appears to merely adopt the conditions  
22 necessary for a Chapter 9 filing."

23           THE COURT: What do those statements appear in?

24           MS. GREEN: It's Orr Exhibit 4, JDRD0000295. It's  
25 an e-mail.

1 THE COURT: Right, but what is that?

2 MS. GREEN: An exhibit. It's an e-mail.

3 THE COURT: An e-mail. Thank you.

4 MS. GREEN: E-mail. I'm sorry. In February of  
5 2013, Mayor Bing was approached by Mr. Baird regarding Kevyn  
6 Orr as the candidate for the emergency manager position, and  
7 Mayor Bing recalls that the only salient qualifications he  
8 was offered about Mr. Orr was his bankruptcy experience. Mr.  
9 Baird told him about Kevyn Orr's experience in part of the  
10 Chrysler bankruptcy team, and Mr. Orr -- Mayor Bing was  
11 asked, "Did you ask Mr. Baird anything else about Mr. Orr's  
12 qualifications to serve as emergency financial manager?" And  
13 then he answers, "He -- yes, I did, and he felt that not only  
14 was he a lawyer that dealt with bankruptcy for over 30 years,  
15 but he also had some qualification as it related to  
16 restructuring." "And did Mr. Baird indicate that Orr had  
17 qualifications concerning restructuring outside the context  
18 of bankruptcy?" "That would be no" was his response.

19 In March the governor declared that a local  
20 government financial emergency existed in the City of  
21 Detroit. At the end of March, Kevyn Orr was appointed  
22 emergency manager of the City of Detroit. On March 28th PA  
23 436 becomes effective, and in April of 2013 Jones Day is  
24 engaged as legal counsel for the City of Detroit.

25 After being appointed emergency manager, Kevyn Orr

1 is quoted on May 12th, 2013 -- we've all heard this quote,  
2 but I'll say it again -- that the public can comment on the  
3 city's financial and operating plan, but we are not, like,  
4 negotiating the terms of the plan.

5 The day before presenting its proposal to the  
6 creditors, Mr. Orr gives an interview with the Detroit Free  
7 Press and expresses his intent to evade the pensions clause  
8 through a federal Chapter 9 bankruptcy proceeding, and we  
9 have quoted for you the portion of that interview and  
10 highlighted it in yellow. He states, "If you think your  
11 state-vested pension rights, either as an employee or  
12 retiree -- that's not going to protect you. If we don't  
13 reach an agreement one way or the other, we feel fairly  
14 confident that the state federal law, federalism, will trump  
15 state law."

16 On June 14th, the emergency manager held a meeting  
17 at the Detroit Metropolitan Airport and presented the city's  
18 proposal for the creditors. The evidence will show that the  
19 city proposed to fully -- fully intended to impair or  
20 diminish accrued financial benefits. This is an excerpt from  
21 the proposal for creditors, and it clearly states that with  
22 respect to unfunded pension liabilities, quote, "such  
23 contributions will not be made under the plan." And it  
24 further states there must be, quote, "significant cuts in  
25 accrued vested pension amounts for both active and currently

1 retired persons."

2           On June 20th, the emergency manager undertook a  
3 presentation regarding the city's finances and plan  
4 restructuring to both uniform and nonuniformed retirees.  
5 Numerous witnesses who attended this meeting, several of  
6 which will be testifying at trial, will testify that they did  
7 not observe or participate in any negotiations regarding the  
8 city's financials and that these meetings were purely  
9 informational.

10           On June 27th following this presentation that I just  
11 spoke of, the city sends a letter to the UAW thanking them  
12 for their time in participating in the meeting, and in that  
13 letter even the city acknowledged that the unions would need  
14 more information moving forward. The letter here is quoted,  
15 "The city recognizes that representatives of active and  
16 retired employees will need access to additional information  
17 to analyze the restructuring proposals outlined in the June  
18 20 meetings. Information relevant to these proposals will be  
19 made available in the on line data room," but at this time on  
20 June 27th, that information, as they were saying, was not yet  
21 available.

22           Five days later on July 23rd Gracie Webster and  
23 Veronica Thomas commenced lawsuits against the State of  
24 Michigan, the governor, and the treasurer seeking a  
25 declaratory judgment that PA 436 violated the pensions

1 clause, and they also sought an injunction.

2 In July when several of the creditor meetings took  
3 place, the evidence will show that the city had no intention  
4 of actually negotiating with its creditors. By July 8th you  
5 will see an e-mail with an attachment of a timeline and a  
6 communications roll-out demonstrating that the city had  
7 already determined that its Chapter 9 petition was going to  
8 be filed on July 19th. There's a timeline crafted by the  
9 State of Michigan that identifies July 19th as a filing date  
10 despite the fact that the creditor meetings had not yet  
11 occurred. Therefore, the objecting parties submit that  
12 Chapter 9 was already a foregone conclusion before the city  
13 met with its creditors on July 10th and 11th. In fact, here  
14 is a copy of that Chapter 9 roll-out, communications roll-out  
15 that I spoke of. In an e-mail from Kevyn Orr's press  
16 secretary, Bill Nowling, to certain state officials, he lays  
17 out the communications plan. And if you go down to the  
18 yellow portion, it starts with, "We negotiated in good faith  
19 with all of Detroit's creditors." Mind you, several of the  
20 meetings had not yet even occurred. "We presented a  
21 comprehensive restructuring plan to creditors in June. At  
22 this point, it would be impractical to continue discussions  
23 out of court because it is clear that we will be able to  
24 reach agreement with some creditors only through a court-  
25 supervised process, and the State of Michigan has authorized

1 the emergency manager to take this step." This is on July  
2 8th.

3 The timeline attached to that communications roll-  
4 out on Thursday, July 18th, states that, "Last minute  
5 revisions will be made to all the key documents," and on  
6 Friday, July 19th, which is in bold and capital letters  
7 called "The Filing Day," at nine o'clock the Governor's  
8 Office is supposed to transmit the authorization letter to  
9 the emergency manager, and at ten o'clock on the 19th the  
10 necessary paperwork is supposed to be filed with the court  
11 system, and then a series of press conferences are to be  
12 held.

13 The following day, on July 9th, an e-mail from  
14 Treasurer Dillon to the governor of the State of Michigan  
15 states that, "We are still in the informational mode." This  
16 e-mail is interesting for several reasons. First, it states  
17 that Kevyn will meet the Detroit pensions the following day,  
18 on July 10th. It says there will be no exchange of documents  
19 and that he will not translate that -- the information that  
20 he gives into an impact on retiree or employees' vested  
21 rights. Treasurer Dillon continues and says that there are a  
22 lot of creative options that we can explore to address how  
23 they will be treated in restructuring with respect to the  
24 pensions, but at his deposition when he was -- when he was  
25 asked whether these creative options were ever explored

1 directly with the Retirement Systems, Dillon said no. And  
2 it's not up there, but he also was asked if they were ever --  
3 these creative options were put into written reports or  
4 formal proposals, and he also said, no, they were not.

5 Further in the e-mail he says to the governor,  
6 "Tomorrow's meeting could lead to questions directed to you  
7 about your view on this topic. In my view, it's too early in  
8 the process to respond to hypothetical questions. We remain  
9 in many ways in the -- at the informational stage." This was  
10 just one week before the filing. And Mr. Dillon admitted at  
11 his deposition that nothing changed between July 9th and the  
12 filing date of July 18th that would take them out of this  
13 informational stage, as he called it.

14 On July 10th and 11th, there were a series of  
15 creditor negotiations -- alleged creditor negotiations that  
16 took place. The emergency manager himself did not even  
17 attend, but witnesses who did attend the meeting will testify  
18 that they did not observe or participate in any negotiations  
19 regarding the city's finances and that, again, these meetings  
20 were purely informational. And this is consistent with the  
21 state treasurer's report to the governor that as of July 8th,  
22 we are still in the informational mode. It's also consistent  
23 with Mr. Orr's admission at his deposition when he was  
24 questioned, "There were no actual negotiations at the June  
25 14th meeting, were they?" And he answers, "No, not as it's

1 generally understood."

2           Lastly, the fact that there were no negotiations on  
3 July 10th and 11th is consistent with the city's and the  
4 state's communications roll-out, which already adopted the  
5 excuse that negotiations were going to be impractical.

6           On July 12th, following those meetings, the Detroit  
7 Fire Fighters Association sends a letter to the emergency  
8 manager asking for more information and stating, "It would be  
9 productive if the city could provide us with its specific  
10 proposals on pension benefit restructuring as soon as  
11 possible. We have two meetings with the city where pension  
12 benefits were addressed and still have only the city's  
13 general observation that pension benefits must be reduced."  
14 At trial Mark Diaz, the president of the Detroit Police  
15 Officers Association, and Dan McNamara, president of the  
16 Detroit Fire Fighters Association, will testify that no  
17 specific proposals were ever given by the city after this  
18 letter, and instead the city filed bankruptcy just six days  
19 later.

20           On July 15th the Webster defendants filed a response  
21 brief and a motion for summary disposition. In that court  
22 paper, the state asserted that a bankruptcy filing by the  
23 City of Detroit is, quote, "only a possibility that  
24 plaintiff's claims were, quote, 'unripe, premature, and based  
25 on a speculative threat of future injury.'" And mind you,



1 this position is taken in open court, which conflicts with  
2 the timeline that had already been circulated within the  
3 Governor's Office that slated the filing date as just four  
4 days later.

5 On July 16th Mr. Orr submitted the bankruptcy  
6 recommendation letter to Governor Snyder and Treasurer  
7 Dillon. In that letter he stated that dramatic but necessary  
8 benefit modifications must be made. The governor  
9 acknowledged that he read that letter before authorizing the  
10 filing and that he knew that the city's request for  
11 authorization that dramatic cuts be given would be part of  
12 any Chapter 9 process. He also testified that he knew,  
13 quote, "based on the facts going into it, there was a  
14 likelihood accrued pension benefits would be reduced in the  
15 Chapter 9 case."

16 The next day, the Detroit Public Safety Unions  
17 received correspondence from the city thanking them on behalf  
18 of the emergency manager for their, quote, "strong  
19 cooperation regarding the City of Detroit pension  
20 restructuring." Later that same day, the Retirement Systems  
21 filed their lawsuit against the governor and the emergency  
22 manager in Ingham County Circuit Court seeking declaratory  
23 relief. That same night at 6:23 p.m. the governor's press  
24 secretary, Sara Wurfel, circulates an updated timeline that  
25 still shows the bankruptcy filing date of Friday, July 19th.

1 This is July 17th at 6:23 p.m. The following day, the  
2 Retirement Systems filed a motion for a TRO seeking an  
3 injunction. At 3:05 p.m. that afternoon, Margaret Nelson of  
4 the Attorney General's Office received a telephone call  
5 informing her that Retirement Systems were in court seeking a  
6 TRO. At 3:47 the governor e-mailed his authorization letter  
7 to Orr and to Treasurer Dillon, and at 4:06 Orr changes the  
8 date on the filing papers from July 18th, crosses out the 19  
9 because it was supposed to be filed the 19th, handwrites in  
10 an 18 and files the petition one hour and one minute after  
11 finding out that the Retirement Systems were in court seeking  
12 a TRO, which is inconsistent with the timeline sent at 6:30  
13 the night before saying it was going to be on Friday.

14 And at 4:10 p.m. the attorney general appears for  
15 the TRO hearing in Ingham County. This is reflected in the  
16 papers filed by the state, the docket history and the hearing  
17 transcripts. Orr later admitted that he was being counseled  
18 that it would be, quote, irresponsible not to file the  
19 petition sooner rather than later given all the lawsuits that  
20 were popping up.

21 On July 19th, the following day, the declaratory  
22 judgment was entered against the governor, the treasurer, and  
23 the State of Michigan and that declaratory judgment states PA  
24 436 is unconstitutional and in violation of Article IX,  
25 Section 24, of the Michigan Constitution, and it further

1 states the governor is prohibited from authorizing an  
2 emergency manager to proceed under Chapter 9, yet the city  
3 filed its Chapter 9 petition despite the fact that each of  
4 its advisors uniformly testified at their depositions that  
5 the city's financial information was still incomplete as of  
6 the filing, and, in fact, today it is still incomplete.

7 Charles Moore, senior managing director at Conway  
8 MacKenzie, testified that quote, when he was asked, "Has  
9 there been a specification of those level of cuts that the  
10 city contends must occur?" He says, "I mean have you put a  
11 dollar amount on it?" He answers, "No. Our analysis of this  
12 continues. Right now we still don't know what assets could  
13 be available to put toward the pensions. We still have not  
14 had the type of dialogue that we would like to have related  
15 to the calculation of the unfunded amount, so because of  
16 those two uncertainties, among others, we don't know what  
17 cuts, if any, there may need to be."

18 The state treasurer also agreed that as of July 8th,  
19 just a week before the filing, "I thought that the situation  
20 was not understood enough for the governor to go on record  
21 yet because I couldn't even tell him with any degree of  
22 confidence what level of funding the pension funds had, so  
23 why should he get in the middle of a debate about this?"

24 In addition, as of the petition date -- and I  
25 believe the city's witnesses will testify consistent with

1 their depositions -- that to date the city still -- the city  
2 still does not know the value of two of its primary assets,  
3 including the Water and Sewage Department and the city-owned  
4 artwork at the Detroit Institute of Arts. Because the city  
5 still does not know what assets are available to satisfy  
6 liabilities, does not know the scope of the liabilities, it  
7 is the objecting parties' position that the Chapter 9 filing  
8 was premature and not made in good faith. Thank you. I  
9 believe Mr. Ullman may be following me.

10 THE COURT: Okay.

11 MS. GREEN: I apologize. It's Lynn Brimer.

12 THE COURT: Okay. Perhaps we should move that  
13 lectern back to center, huh?

14 MS. BRIMER: I can do that.

15 THE COURT: Okay. Thank you.

16 MS. BRIMER: Is this good, your Honor?

17 THE COURT: That's great. Let me just ask will  
18 there be other uses of the projector during openings?

19 ATTORNEY: Yes, your Honor.

20 THE COURT: Okay.

21 OPENING STATEMENT

22 MS. BRIMER: Good morning, your Honor. And, your  
23 Honor, I thank Mr. Bennett for raising the legal issues with  
24 respect to the spending provision because it at least makes  
25 me more comfortable as to why I thought it's so important we

1 clarify the record on the discovery matters with respect to  
2 which law had a spending provision added onto it.

3 THE COURT: Okay.

4 MS. BRIMER: So rather than address my opening issue  
5 to begin with, would the Court like me to address the legal  
6 issues raised by Mr. Bennett, or would you like the legal  
7 issue -- I am prepared to briefly discuss those. I don't  
8 have a written preparation, but I do think it's important for  
9 the Court to understand I did look at the case that  
10 Mr. Bennett cited. I didn't disregard any case law when  
11 coming to this Court and believing that there was a factual  
12 issue.

13 With respect to the Michigan United case, I think  
14 it's factually distinguishable again. That case did not  
15 involve an original law that did not have a spending  
16 provision that was overturned on referendum and then a new  
17 law presented. In that case, your Honor, the issue was  
18 whether or not the spending provision itself added in the  
19 original law such that it was not subject to referendum was,  
20 in fact, an appropriate provision taking it out of the  
21 referendum provision. You know, under -- your Honor, that is  
22 not the facts that we have before us today.

23 In addition, your Honor, I have reviewed Justice  
24 Corrigan's opinion, which, by the way, was a concurring  
25 opinion, not the Court's majority opinion, but she addressed

1 the issue of intent and that, generally speaking, we do not  
2 look to the motive or intent of the legislature --  
3 legislative body when passing a law, but she said this is  
4 because -- and she notes this in a footnote -- this is  
5 because, generally speaking, we do not have any testimonial  
6 record regarding motive or intent. That would be, your  
7 Honor, in her concurring opinion. There is no testimonial  
8 record in the -- in this original action regarding the motive  
9 or intent. Well, your Honor, that is simply not the case in  
10 this matter. As Ms. Green read to you and as I quoted from  
11 the state's own 30(b)(6) witness, we have evidence regarding  
12 the motive of the inclusion of the spending provisions on an  
13 act that had previously been rejected on referendum. We  
14 believe that factual issue is important to this Court in  
15 determining that whether or not some or all of PA 436 should  
16 have been subject to the second provision that everyone seems  
17 to gloss over in Article II, Section 9, of the Constitution,  
18 which states specifically that no law that has properly been  
19 submitted to referendum can then -- and rejected can then be  
20 passed without a referral back to the general electorate.

21 Your Honor, the cases cited by the state, Ms.  
22 Nelson, of Reynolds v. Martin and the case cited this morning  
23 just simply are not factually similar enough to PA 436 to be  
24 controlling, and we do -- and, you know, my closing -- my  
25 opening can be as simple as, your Honor, the evidence will

1 show that the motive of including the spending provisions was  
2 to, in fact, take an act that had previously been overturned  
3 on referendum and disregard the will of the people, and it's  
4 very clear. The state's attorney argued yesterday that we  
5 knew what the people's will was because we have the media.  
6 Well, we know what the people's will was. The people's will  
7 was that we not have an emergency manager who would supplant  
8 the democratically elected officials in the City of Detroit,  
9 and that was very clear, and yet we now have PA 436, which  
10 disregarded that, which added a spending provision to it, and  
11 the facts will demonstrate that we can establish what the  
12 motive was in adding those spending provisions. And,  
13 moreover, we can establish that the emergency manager,  
14 Mr. Orr, was fully aware of that at the time he accepted his  
15 appointment as the emergency manager. I'll conclude --

16 THE COURT: Well, how do you -- how do you deal with  
17 Mr. Bennett's argument that if the issue is ever appropriate  
18 for court review, it is not appropriate until petition  
19 signatures are collected on the bill that has the spending  
20 provision in it and the petitions are rejected because it's  
21 not the kind of a law that can be subject to a referendum?

22 MS. BRIMER: Well, certainly I don't think there's  
23 any case law that would suggest that the people be required  
24 to take an act which on its face would be rejected. I'm not  
25 sure I'm aware of any case law that would suggest that the

1 people had to refer that case -- the law to a referendum and  
2 have it denied because of the failure -- or the inclusion of  
3 the spending provision. At issue here, your Honor, is  
4 whether or not the act is sufficiently similar enough, not  
5 that it had to go back to referendum, but whether it's  
6 sufficiently similar enough that the second provision would  
7 require that it be deemed to be unconstitutional because it  
8 was not presented to the people again.

9 THE COURT: Okay. All right. Let's take our lunch  
10 break now. Before we do, I want to remind everyone that we  
11 are guests here in this building, and we need to maintain  
12 decorum and silence while we are in the hallways. Please  
13 don't linger in the halls. You can have your conversations  
14 here in the courtroom over lunch if you'd like to do that, or  
15 in the elevator or on the 1st floor, but please maintain  
16 silence in the hall. Let's see. It's noon. We'll reconvene  
17 at 1:30, please, and that's it.

18 THE CLERK: All rise. Court is in recess.

19 (Recess at 11:59 a.m., until 1:30 p.m.)

20 THE CLERK: Court is in session. Please be seated.

21 THE COURT: Counsel are present. We have a couple  
22 of housekeeping matters that we need to address before we  
23 continue with our opening statements, please. The first is  
24 that in the amended final pretrial order that was submitted  
25 through our order processing program, on Attachment G, which



1 is the attachment from the Retirement Systems, the exhibit  
2 numbers were omitted. I'm sure that was inadvertent, so  
3 please fix that and resubmit it as soon as possible so that  
4 we can get it entered. Okay?

5 ATTORNEY: Of course, your Honor.

6 THE COURT: And then a second brief housekeeping  
7 matter is -- is Ms. Green still here?

8 ATTORNEY: She's not here yet, your Honor.

9 THE COURT: Okay. Mr. Gordon, just to keep the  
10 record a hundred percent clean, we need to put an exhibit  
11 number on a paper version of the slide presentation so that  
12 for the record that is identified, whatever exhibit number  
13 you want to put on it.

14 MR. GORDON: All right. Very well, your Honor.

15 THE COURT: Okay.

16 MR. IRWIN: Your Honor, will counsel be provided a  
17 copy of that when it's done in that way?

18 THE COURT: Can you do that?

19 MR. GORDON: Yes, absolutely.

20 THE COURT: Okay. All right. We are ready to  
21 proceed.

22 OPENING STATEMENT

23 MR. WERTHEIMER: William Wertheimer, your Honor, on  
24 behalf of the Flowers plaintiffs. I'll be very brief, and I  
25 just want to add a couple of points relevant to the timeline

1 that Ms. Green was showing you. I do not have a clicker, but  
2 I'll just state them.

3 THE COURT: Okay.

4 MR. WERTHEIMER: That is, first, on July 3rd the  
5 Flowers lawsuit was actually filed before the Webster  
6 lawsuit. They were both filed on July 3rd, so they were both  
7 filed that day. Second, on the same day, both Flowers and  
8 Webster cases, Judge Aquilina signed orders to show cause  
9 setting a hearing for the preliminary injunction that we were  
10 seeking for July 22nd so that -- and those were served on the  
11 governor and the treasurer on July 3rd so that at the point  
12 in time on the timeline a few days later when they're setting  
13 the putative bankruptcy for July 19th, Friday, they know that  
14 the state court preliminary injunction hearing is being  
15 scheduled for July 22nd, the following Monday. That's it.  
16 Thank you.

17 THE COURT: Okay.

18 OPENING STATEMENT

19 MS. CECCOTTI: Good afternoon, your Honor. Babette  
20 Ceccotti, Cohen, Weiss & Simon, LLP, for the UAW. Ms.  
21 Green's timeline was very complete and detailed. I do want  
22 to just -- because I don't think this particular slide was up  
23 there, so I would like to mention the pitch book again. Ms.  
24 Green had a slide from the Jones Day pitch book from January  
25 20, 2013, and one thing that -- when your Honor goes through

1 the pitch book you'll notice that there are, you know, a  
2 few -- quite a few, I would say, or certainly more than one  
3 or two references to the use of Chapter 9 either itself or  
4 the shadow of Chapter 9 as leverage vis-a-vis creditors, vis-  
5 a-vis specific proposals and claims related to labor costs,  
6 and I think Ms. Green showed the slide with the quote on  
7 there about using Chapter 9 to reduce accrued financial  
8 benefits.

9           The other thing that I'd like to mention about the  
10 pitch book, which really does become something of a  
11 blueprint, I think, for what follows, is at page 57 there's a  
12 slide that reads, "Any Chapter 9 process should be  
13 comprehensive," and it starts with the bullet, "plans of  
14 adjustment address narrow range of economic compromises."  
15 And then it talks -- and then there are other bullets that  
16 follow, "other fundamental changes must occur outside the  
17 plan context," "any Chapter 9 process should pursue as many  
18 revitalization initiatives as possible," "negotiating in  
19 Chapter 9 or its shadow is a powerful tool for  
20 revitalization," and, finally, "the city should take  
21 advantage of its opportunity for long-term comprehensive  
22 solutions."

23           So that's actually a good segue to June 14th  
24 proposal because, as we've talked about before in the other  
25 arguments that we've had, this is really a massive

1 comprehensive revitalization proposal that really has  
2 elements of more or less what that slide that I just read you  
3 is talking about. It's got -- the plans include a \$1.25  
4 billion spending program going out over ten years. There are  
5 many detailed wide-ranging initiatives that have to do with  
6 improvement of services, upgrades, reinvestment, and the  
7 like, and there is also a restructuring proposal. There's a  
8 section called "restructuring proposal." I don't have to  
9 take you through that because we've been through it a number  
10 of times. You know what the pension proposal -- what the  
11 pension proposal is, but the point being that the -- just the  
12 four corners of the proposal itself, what that reflects in  
13 terms of what it is that the city is trying to pursue through  
14 Chapter 9.

15           In terms of the events following the launch of that  
16 proposal on June 14th, I think that we see a number of  
17 things, and the evidence will show this. As we saw actually  
18 from Mr. Bennett's slide, the number of meetings that  
19 actually occur on this proposal -- regarding this proposal  
20 are relatively few. It's a limited number of sessions.  
21 Regardless of how we're characterizing them, there's at least  
22 one document that refers to one of the meetings as  
23 informational, in fact.

24           We have the data room issue. Ms. Green read the  
25 letter or showed the letter to the UAW regarding the fact

1 that the data room wasn't quite up and running yet, but what  
2 is also true about the data room, as your Honor knows from  
3 the early days of this case, is that in order to access the  
4 data room, one had to sign a confidentiality agreement and an  
5 additional release to get the Milliman pension materials, and  
6 my client, at least, took issue with that prior to the  
7 bankruptcy, and others may -- other groups may have as well,  
8 so you had this quite massive proposal, a series of really a  
9 handful of meetings being held with the data that the city  
10 was loading into the data room about the proposal not readily  
11 available.

12 In addition, as I mentioned, these were not -- there  
13 were just a few of these meetings, and I think the evidence  
14 will show that they wouldn't really constitute labor  
15 negotiations. The unions, you know, have various ways that  
16 they talk about that in the evidence. They are fairly  
17 well -- I guess I'll just use the word "highly organized" or  
18 the phrase "high organized" by the city, including one  
19 meeting where -- at least one meeting where if there were  
20 questions about the proposal, those in attendance were  
21 required to submit them on cards, and the cards would be read  
22 as opposed to any sort of free flowing give and take that one  
23 might associate with a meeting with stakeholders that we  
24 might think about in terms of going over a restructuring  
25 proposal or even a labor proposal.

1           So now I'd like to get to Mr. Bennett's comments  
2 about the UAW because I think this really does -- that this  
3 is really a very important point. Yes, it is true that, as  
4 we know, the proposal included the cessation of funding to  
5 the Retirement System and the statement about -- the  
6 statement that significant cuts to accrued vested pension  
7 benefits would be necessary, so, yes, on its -- the UAW's  
8 position is, yes, on its face, looking at that on page 109,  
9 if that's the right page, that is a proposal that violates  
10 the Michigan state Constitution, and the immediate questions  
11 that arises on its face just looking at it like that is how  
12 could it be accepted. How could it be accepted by a labor  
13 union? How could it be accepted by anyone purporting to  
14 speak for or represent actives or retirees? So, yes, on its  
15 face the proposal was not acceptable, and we believe that  
16 that has legal consequences as distinct from fact  
17 consequences, so I do want to make that point about the --  
18 about our objection -- our amended objection in that regard.  
19 We very much believe that that has legal consequences.

20           As a factual matter, however, and notwithstanding  
21 the fact that the proposal on its face could not be accepted,  
22 you couldn't simply hand it to the union with a signature  
23 line and say, "Here, sign," the UAW, through its general  
24 counsel, contacted Jones Day on July 9th, and we'll have a  
25 witness to this effect, and we have an exhibit on it as well,

1 to raise a couple of points, one regarding the data room and  
2 the confidentiality issue that I mentioned already. Then in  
3 response to the letter that Mr. Bennett's chart showed trying  
4 to ask the labor organizations and the retiree groups if they  
5 would be representing their retirees, the e-mail to Jones Day  
6 reads as follows: "Further to its reservation of rights, the  
7 UAW continues to seek an answer from Mr. Orr and your firm as  
8 to the following: Please cite the basis for any claim that  
9 the UAW has the authority to compromise the vested benefits  
10 of active and/or retired UAW or former UAW members employed  
11 or formerly employed by the City of Detroit and its  
12 affiliates. As I presume you know, Article IX, Section 24,  
13 of the Michigan Constitution provides in pertinent part that,  
14 quote, 'the accrued financial benefits of each pension plan  
15 and Retirement System of the state and its political  
16 subdivisions shall be a contractual obligation thereof which  
17 shall not be diminished or impaired thereby,' unquote.  
18 Please tell me what authority your firm and/or Mr. Orr  
19 believe gives the UAW the right to compromise vested pension  
20 benefits despite the contrary provisions of Article IX,  
21 Section 24. Please tell us -- please also tell us whether  
22 Mr. Orr and/or your firm take the position that Article IX,  
23 Section 24, of the Michigan Constitution is not or may not be  
24 binding on the City of Detroit, the State of Michigan,  
25 Governor Snyder, Mr. Orr, or the UAW and state, if that is

1 the case, under what circumstances you believe that Article  
2 IX, Section 24, would not bind some or all of these persons  
3 or entities. We also seek the answer to the same question  
4 with regard to vested post-retirement insurance benefits,"  
5 and then there's a reference to the Supreme Court's decision  
6 in the Pittsburgh Plate Glass case. And the letter makes it  
7 clear that, again, from the UAW's perspective, "We do not  
8 understand the July 10 and 11 multiple stakeholder meetings  
9 to which we have been invited to be a forum for negotiations  
10 of your proposed pension and retiree healthcare changes but  
11 are willing to attend and obtain for our union whatever  
12 information may be provided at those meetings," and then --  
13 and, finally, "Your full answers to the questions posed in  
14 the foregoing paragraphs of this message will help the UAW  
15 determine the scope of any such negotiations and the UAW's  
16 decisions regarding its representative capacity in them about  
17 which your firm has inquired." So we very much have a  
18 factual case as well as a legal case regarding the  
19 implications of the proposal, and I did want to make that  
20 clear for the record, the point being that what is in this e-  
21 mail represents some fairly fundamental questions about the  
22 ground rules upon which discussions or negotiations with the  
23 city regarding its proposal can proceed.

24 I should note that -- and we'll have testimony to  
25 this effect -- that no answer was forthcoming from the city



1 and, as far as I know, has not been forthcoming regarding the  
2 questions posed other than obviously when we got into  
3 bankruptcy, your Honor solved the problem of the data room.

4 Time frame. Putting aside the lawsuits and all of  
5 the activity surrounding all of that, it does appear that the  
6 city set out a timeline for itself that only had about a 30-  
7 day period for this launch notwithstanding everything that's  
8 in that proposal and everything that was expected apparently  
9 to be accomplished by it. I think I heard Mr. Bennett refer  
10 to something like evaluation week, which was supposed to  
11 occur on or which probably did occur -- I gather it did occur  
12 on July 15th. That's really a month later. So one -- now,  
13 Mr. Bennett's timeline, of course, goes way back -- I think  
14 it was to 2011 and the various initiatives to deal with  
15 Detroit's problems, and we are certainly not denying any of  
16 those or -- and I'm sure everyone is fully cognizant of --  
17 particularly those who live here are fully cognizant of all  
18 of those efforts, but we think, as a legal matter, that those  
19 efforts really don't legally count. They obviously count to  
20 the citizens of Detroit, but for purposes of eligibility, the  
21 relevant time frame, from our perspective, is the proposal is  
22 launched on June 14th and then apparently evaluated -- the  
23 response or reaction apparently evaluated merely -- a mere  
24 four weeks later.

25 So during this time, again, the evidence, we

1 believe, will show that during the same sort of compressed  
2 time period, we know that the governor and the emergency  
3 manager are meeting on a fairly regular basis. We know that  
4 the governor had seen the June 14th proposal. He had a draft  
5 of it before it was launched. He knew about the pension  
6 proposal. He knew that there was an issue -- a legal issue  
7 with respect to Article IX, Section 24, of the Michigan  
8 Constitution and the effect, if any, of the Bankruptcy Code  
9 and federal law on the continued enforcement of that section.  
10 He knew it was a serious issue.

11           We know, again, since we've discussed it most  
12 recently last week at the argument that we then march through  
13 the timeline to get to Mr. Orr's July 16th request and the  
14 governor's July 18th response. We know that the governor  
15 obviously from the dates signed it only two days later  
16 apparently with a review of all of the material that was  
17 contained in Mr. Orr's letter, I think could probably best be  
18 characterized as limited. It does not appear that there was  
19 an independent evaluation that the governor conducted  
20 regarding many of the sort of predicate items that Mr. Orr  
21 laid out in his letter. The governor was also aware, as we  
22 know from the slides that Ms. Green showed, that the pension  
23 numbers were very much still up in the air and in question.  
24 Nevertheless, both the July 16th and the July 8th -- the July  
25 16th letter from Mr. Orr and the July 18th approval letter

1 from the governor lay out the -- what I will characterize as  
2 the shift in spending priorities. This is the part of the  
3 proposal that relates to revitalization, and we know that the  
4 governor in his letter approves of the manner in which  
5 Mr. Orr has proposed to proceed in that regard, and so he  
6 signs the letter, and, of course, the bankruptcy petition is  
7 filed on the 18th.

8           So what all of this adds up to we think at the end  
9 of the day in terms of the legal cases -- in terms of our  
10 legal objections is a fairly deliberate plan to use Chapter  
11 9. We think that really knitting -- connecting all of the  
12 dots here, that the plan was to use Chapter 9. We've saved  
13 for another day all of the legal issues associated with that,  
14 the state's authorization. There's really -- well, we won't  
15 get into those because we'll have closing, and we've had --  
16 and we'll have other briefs on all of that, but the sort of  
17 deliberate plan, which starts whenever you'd like to start it  
18 on the timeline but certainly from the governor's appointment  
19 of Mr. Orr leaving his -- leaving the Jones Day firm, the  
20 Jones Day retention by the city, this really several month  
21 timeline leading from the end of March to the middle of July,  
22 we believe the evidence establishes this as a deliberate plan  
23 to use Chapter 9 to, in effect, find a way to undermine the  
24 Michigan state Constitution through the use of bankruptcy.  
25 We believe that that is evidence of a lack of bad faith under

1 921(c), a lack of bad faith in connection with --

2 THE COURT: You mean a lack of good faith?

3 MS. CECCOTTI: I'm sorry. A lack of -- yes.

4 Apologies, your Honor. Not enough sleep, once again, I'm  
5 afraid.

6 THE COURT: Okay.

7 MS. CECCOTTI: Now I'm afraid to open my mouth. No  
8 good faith --

9 THE COURT: I'll help you.

10 MS. CECCOTTI: Yes. All right.

11 THE COURT: I'll help you.

12 MS. CECCOTTI: No good faith, a lack of good faith  
13 negotiations under 109(c)(5), and not a valid plan of  
14 adjustment for Chapter 9 purposes. Thank you.

15 OPENING STATEMENT

16 MS. PATEK: Good afternoon, your Honor. Barbara  
17 Patek again on behalf of the Detroit Fire Fighters  
18 Association, the Detroit Police Officers Association, the  
19 Detroit Police Lieutenants & Sergeants Association, and the  
20 Detroit Police Command Officers Association, who have been  
21 collectively referred to in these proceedings as the Detroit  
22 Public Safety Unions or the Public Safety Unions.

23 As the evidence in this case will show, the public  
24 safety unions are the recognized collective bargaining  
25 representatives of the nearly 3,200 men and women employed by

1 the Detroit Fire Department and the Detroit Police  
2 Department. I'm sure we'll hear from Chief Craig either  
3 today, tomorrow, or sometime this week about the very  
4 daunting and difficult conditions in which they work to  
5 provide -- excuse me -- police and fire services to -- that  
6 are so essential to the survival and the revival of the City  
7 of Detroit.

8           The public safety unions piece of this in terms of  
9 the evidence is a small but important part of the timeline  
10 that was gone over this morning by Ms. Green and also by  
11 Mr. Bennett. First, I think I want to say at the outset that  
12 the public safety unions have never in these proceedings  
13 disputed that the city was in severe financial distress  
14 beginning in the time period where I believe both Mr. Bennett  
15 and Ms. Green's timelines began. The public safety unions do  
16 not, however, believe that the city can meet its burden of  
17 showing that it is eligible for these Chapter 9 proceedings  
18 because of the issue of the good faith negotiations, what we  
19 believe was a -- as Ms. Ceccotti referred to, a deliberate  
20 effort to sort of create a record of impracticality where  
21 they set themselves up for failure, and we also believe that  
22 the evidence will show, based upon the same set of facts,  
23 that the petition was not filed in good faith as required by  
24 Section 921(c).

25           While we acknowledge the legal nature of the

1 constitutional questions that this Court must wrestle with,  
2 we also believe that the evidence that this Court will hear  
3 in this eligibility trial may help inform those decisions by  
4 providing the Court with a practical and very real platform  
5 in which those questions can be applied.

6 Because the public safety unions will rely on and  
7 adopt certain proofs submitted by the other objectors, I'm  
8 going to try to avoid repeating what was said this morning,  
9 but I do want to briefly address where our proofs will fit in  
10 the chronology the Retirement Systems put up this morning.  
11 And for ease of the Court's reference -- and I apologize in  
12 advance. This will also have to be marked, and we'll get a  
13 paper copy, and I believe --

14 THE COURT: Okay.

15 MS. PATEK: -- it'll be Exhibit 720. Our facts --

16 THE COURT: And I'll have to ask you to understand  
17 that I'm going to be looking at what's there on this little  
18 screen here just because it's easier for me. It's not that  
19 I'm not paying attention to you. I'm looking at it here.

20 MS. PATEK: That's okay. That's okay. The public  
21 safety unions' piece of it are in red, and the portions in  
22 black are portions from Ms. Green's timeline, and we did that  
23 so the Court could see where they fit in. And we start in  
24 December of 2011 and January of 2012, but before we start  
25 talking about that time period, I do want to take a moment

1 because I think it's important to this negotiations issue,  
2 and I think it's also important to some of the state labor  
3 law issues that inform how we ended up in Chapter 9 to take  
4 the Court back about 44 years ago. In the fall of 1969,  
5 again, not long after the city had been through some very,  
6 very trying times, then Governor Milliken, a Republican  
7 governor, signed into law an act found beginning at MCL  
8 423.231 that has become -- come to be known as Act 312. Act  
9 312 is, as the Court may be aware, the platform on which  
10 public safety unions negotiate their labor agreements under  
11 the auspices of the Michigan Employment Relations Commission.  
12 Before the emergency manager, terms and conditions of  
13 employment were negotiated pursuant to this process. That  
14 process, which will be described by one of our witnesses, the  
15 Detroit Police Command Officers' labor attorney, Mary Ellen  
16 Gurewitz, is designed to provide for a period of mediation  
17 followed by, if the mediation fails, compulsory arbitration,  
18 including the opportunity to send the parties back to  
19 mediation, and it's designed to be expeditious and to keep  
20 labor peace and, if might say, might be a tool that if it  
21 could be applied to everybody in this proceedings, some of  
22 the mediators working so hard to try to resolve our  
23 differences might find useful. Ms. Gurewitz will explain  
24 much better than I can the mechanics of the Act 312 process  
25 and also her experience in negotiating with the city and the

1 DPCOA in the relevant time period.

2           We start with 2011 and two thousand -- December 2011  
3 and January of 2012, and I believe that was also on  
4 Mr. Bennett's initial timeline. Interestingly, at that time,  
5 there were negotiations between the city, recognizing the  
6 financial difficulties that were present, and each of the  
7 Detroit public safety unions of concessionary agreements or  
8 tentative agreements. These agreements were never adopted,  
9 but our purpose in offering them is to show that where  
10 there's a will, it could be done. Our intention is not to  
11 suggest in this setting that such negotiations would be easy,  
12 and that's precisely taking up on Ms. Ceccotti's point why  
13 that 30-day period that the city gave itself was doomed to  
14 fail.

15           During the same time period as the various acts were  
16 being repealed and reenacted and shortly after the governor  
17 signed PA 436 into effect, Mark Diaz, the president of the  
18 Detroit Police Officers Association, will tell the Court that  
19 pursuant to Act 312 proceeding, there was an award that  
20 became the contract for the Police Officers Association  
21 through June of 2014. This is important because, as I'm  
22 going to talk about continuing along this timeline to the  
23 period after the appointment of the emergency manager, which  
24 takes us to our second slide, there were acts that the city  
25 took to specifically remove this tool from the tool kit of



1 the city and its labor unions, and I'm not suggesting that  
2 that removal was not perhaps authorized, although the unions  
3 dispute that as a matter of labor law under Public Act 436,  
4 but I think that it's important to suggest that in light of  
5 the concept that there was a plan and design going back a  
6 long way, it was no accident that, you know, the city filed  
7 an emergency motion on April 18th of 2013, and on June 14th,  
8 2013, the very same day it rolled out its proposal, it  
9 obtained an opinion from MERC blocking the Police Lieutenants  
10 & Sergeants Association, the Police Command Officers  
11 Association, and the fire fighters from resorting to Act 312  
12 arbitration finding that Public Act 436 had divested MERC of  
13 jurisdiction to address those disputes. And that becomes  
14 important because if you consider that there's a plan on June  
15 30th, 2013, the collective bargaining agreements between the  
16 city, the DFFA, and the DPLSA all expired just two and a half  
17 weeks before the Chapter 9 petition was filed.

18           The president of the Fire Fighters Association, Dan  
19 McNamara, the president of the Lieutenants & Sergeants, Mark  
20 Young, and the president of the DPOA, Mr. Diaz, as previously  
21 referred to, will each tell the Court that very quickly after  
22 the emergency manager's appointment on March 28th, they were  
23 each informed by the city that it was exercising its right  
24 under Public Act 436 not to bargain. I know we've heard  
25 through some of the testimony that that was done to somehow

1 not waive their rights not to bargain, but the Court will  
2 have to consider whether it accepts that as a credible  
3 explanation for what happened next.

4           Following the June 14th presentation, again, as  
5 Ms. Ceccotti referred to, things moved very quickly. There  
6 was a presentation by the city the week of July 10th, and on  
7 July 12th -- and it was up on the screen earlier today in Ms.  
8 Green's presentation, and I believe it is in the record as  
9 Exhibit -- give you the right number here -- I'm not seeing  
10 it, but it's a letter from each of the presidents of each of  
11 the Detroit public safety unions addressed to Jones Day  
12 indicating in response that they were, in fact, interested in  
13 making a counter-proposal. They were seeking more  
14 information and a concrete proposal from the city in that  
15 regard. Four days later, on June -- or July 16th, the  
16 governor -- or I'm sorry -- Mr. Orr sent his letter to the  
17 governor seeking authorization. The following day Jones Day  
18 sent correspondence back to the four public safety unions  
19 thanking them on behalf of the emergency manager for their  
20 strong cooperation in the City of Detroit's pension  
21 restructuring efforts. The next day the petition was filed.

22           Your Honor, we believe that when the Court has heard  
23 all the evidence, that it will be difficult for the Court not  
24 to conclude that in this case that there was, in fact, a  
25 calculated effort by the city going back over an extended

1 period of time to use Chapter 9 to both, in Mr. Orr's words,  
2 trump that constitutional provision but also, as suggested in  
3 some of the arguments last week, to obtain the political  
4 cover that would be provided by this Court to do so. That's  
5 all I have to say.

6 THE COURT: Thank you.

7 MS. PATEK: Thank you very much.

8 OPENING STATEMENT

9 MR. MORRIS: Good afternoon, your Honor. Thomas  
10 Morris of Silverman & Morris on behalf of the Retiree  
11 Association parties. Your Honor, the Court heard a  
12 comprehensive opening statement from the Retirement Systems  
13 and opening statements from other opponents of the city's  
14 eligibility. Those statements chronicle the voluminous  
15 evidence weighing against eligibility. In our pretrial  
16 brief, we focused on the evidence which we will offer through  
17 Shirley Lightsey, president of the DRCEA -- that's the  
18 Detroit Retired City Employees Association -- and Donald  
19 Taylor, the president of the RDPFFA. That's the Retired  
20 Detroit Police & Fire Fighters Association. My opening  
21 statement will, likewise, address that evidence.

22 Mr. Taylor and Ms. Lightsey will testify that their  
23 associations have a long and active history. They're not  
24 organizations which came into being just to respond to the  
25 present situation, but they are and were prepared to deal

1 with it. The police and fire fighters have had a retiree  
2 association since 1946. The DRCEA was formed in 1960. The  
3 elected leadership of these associations includes persons  
4 who, had they been working for the city, would be the ones  
5 responsible for helping resolve the city's problems. Members  
6 and management of the associations include a past chief of  
7 police, a deputy chief, city budget director, personnel  
8 managers, a Retirement Systems trustee, and city financial  
9 and legal staff. These are people who were leaders during  
10 their active service for the city, and they continue to be  
11 leaders for the retirees.

12 More than 12,000 retired nonuniform city employees  
13 are members of the DRCEA, and more than 8,000 retired Detroit  
14 police officers and fire fighters are members of their  
15 organization. Both of these organizations serve city  
16 retirees in a number of ways, but they have particular  
17 expertise in the pension and benefits areas. Although the  
18 associations do not have the power of a governmental body to  
19 enter into agreements that bind their members, the elected  
20 leadership is responsible to the membership and responsive to  
21 the membership. They communicate with the retirees. The  
22 associations go beyond service to their members. Together  
23 they represent the class of retired Detroit employees, all  
24 Detroit retirees, not just the members who send in their  
25 dues. The associations have appeared before City Council.

1 They have lobbied the state legislature. They have been  
2 party to the lawsuits involving pension and benefit issues.  
3 The evidence will show that the associations are the natural  
4 representatives of the retirees capable of negotiating on  
5 their behalf.

6           Upon the emergency manager's appointment, each of  
7 the associations contacted the emergency manager in writing,  
8 sent him a letter. Mr. Orr did not respond to the letters,  
9 but he did invite the association -- associations to  
10 informational sessions which they conducted, the city  
11 conducted, in April, June, and July. Both Ms. Lightsey and  
12 Mr. Taylor attended those meetings.

13           The evidence will show that the city in its meetings  
14 never got beyond the first step of presenting information.  
15 The city never offered to meet with the retirees to discuss  
16 the city's proposal or to negotiate. The retiree  
17 representatives were relegated to being members of the large  
18 audience. The associations had their attorney contact the  
19 city's attorneys, Jones Day, to request the opportunity to  
20 specifically address retiree issues, but nothing came of  
21 that. Instead, on July 18, in a tactical rush, the city  
22 filed its petition.

23           The evidence will show that negotiations with the  
24 retirees was possible. The membership of the associations is  
25 more than a majority of the retirees. Overall it's

1 considerably more than two-thirds. By working with the  
2 membership, the city had the opportunity to make an agreement  
3 with a majority of the retirees and thereby satisfy Section  
4 109(c) (5) (A) either by not impairing the class or by reaching  
5 an agreement.

6           The evidence will show that negotiation was not  
7 impracticable, certainly not with the retirees who, prior to  
8 the appointment of the emergency manager, had already elected  
9 their leaders. The retirees had built and maintained through  
10 the work of generations of dedicated volunteers organizations  
11 which were prepared to work on behalf of the retirees for the  
12 best outcome of Detroit -- for Detroit. The evidence will  
13 show that the emergency manager and his advisors rejected the  
14 opportunity to attempt to resolve matters as to the retirees.  
15 The city, therefore, does not satisfy the eligibility  
16 requirements of Section 109(c) (5). Thank you.

17           THE COURT: Thank you.

18                           OPENING STATEMENT

19           MS. LEVINE: Good afternoon, your Honor. Sharon  
20 Levine, Lowenstein Sandler, for AFSCME. Very briefly and not  
21 to be repetitive, with regard to solvency, the city addressed  
22 AFSCME's brief with regard to our request that there should  
23 actually be expert testimony in order to meet the burden of  
24 proof with regard to this issue, and the city's response is  
25 basically what we've seen in some smaller debtor cases, which

1 is the debtor can testify to its own numbers. And we're not  
2 necessarily disputing that line of cases. What we're saying  
3 here, Judge, is that this is not the debtor that's testifying  
4 to its own numbers. We don't have anybody from the budget  
5 department. We don't have any of the elected officials.  
6 What we have are hired experts who are being offered as fact  
7 witnesses, so we're bringing in experts like Ernst & Young,  
8 Conway MacKenzie, Miller Buckfire, being paid millions of  
9 dollars, who routinely appear as expert witnesses and, for  
10 reasons that we submit are not appropriate here, are just  
11 simply being offered without having to give their expert  
12 testimony with regard to solvency.

13           With regard to impracticality and the issue of good  
14 faith, we would respectfully submit that the argument that  
15 there are simply too many classes of bondholders doesn't make  
16 a lot of sense. The June 14 date that the proposal was  
17 presented and the filing date of July 18th was only one month  
18 and three days. Even if we went by the city's own originally  
19 projected timeline, the filing date was projected to be July  
20 19th. That's only one month and four days. It takes more  
21 months than that to negotiate out-of-court workouts in simple  
22 small single level of debt Chapter 11 cases. We respectfully  
23 submit that the timeline that the city set for itself was a  
24 timeline that was designed not to allow an out-of-court  
25 negotiation to fully take place.

1           The city also looks to the fact that there are too  
2 many bondholders and, therefore, it was impractical to  
3 negotiate with bondholders, and they cited to a New York  
4 case. The only New York case we were able to find that  
5 addressed the issue was the Off-Track Betting case, which  
6 dealt with a six-month period before that case, which wasn't  
7 even an entire city, said that there wasn't enough -- there  
8 wasn't an ability to get it done out of court, and they had  
9 run out of time.

10           The other issue there is too many bondholders means  
11 that you've met the impracticality standard means that what  
12 you're doing is you're writing the need to respond to labor  
13 out of the Code. If you have too many bondholders, it's  
14 impractical, and, therefore, you don't even have to go  
15 further. We would respectfully submit that that would be a  
16 sad day for Detroit if we're actually writing the need to  
17 negotiate with labor out of the Code.

18           The June 14 meeting is the meeting where the  
19 proposal was presented. We've heard the city say that at  
20 that meeting, they invited questions. Okay. So we have a  
21 meeting that lasts a couple of hours. We have a proposal  
22 that's in excess of 110 pages. The amount of time it takes  
23 to even read the slides takes up the lion's share of that  
24 meeting, and in addition to that, the questions which were  
25 permitted were in a very controlled environment and under the



1     guise that the city was, quote, unquote, begging for  
2     feedback. All right. The city announced at that meeting  
3     that these are not negotiations. Now, whether that  
4     announcement was made to preserve a technical reservation of  
5     rights under PA 436, they invited a room full of labor  
6     negotiators, and they held a meeting that was basically a  
7     classroom type instruction meeting, and then they announced  
8     after a brief Q&A period these are not negotiations. And  
9     somehow or other this room full of labor negotiators was  
10    supposed to understand that, well, while they're not  
11    technically legally negotiations per PA 436, we really are  
12    asking for negotiations to meet the good faith requirement  
13    under the Bankruptcy Code. That's not a -- that's not a  
14    realistic or fair interpretation of the facts here coupled  
15    with the fact that we have sophisticated bankruptcy counsel  
16    and all of these sophisticated outside consultants who  
17    apparently, when receiving a letter from these same labor  
18    negotiators that assert in response to the June 14 proposal,  
19    well, we have factual and legal reasons why we think we can't  
20    negotiate with you, that causes them to immediately think  
21    negotiations are impossible. That's not an -- that's not a  
22    fair reaction either. I've never walked into a labor  
23    negotiation where the company said to the union, "Here's your  
24    1113 proposal. What do you think?" and the union has said,  
25    "Oh, good idea." It takes a little bit more than that, your

1 Honor. In addition to that --

2 THE COURT: Well, you raise an interesting point  
3 here that has been on my mind, and that is the extent to  
4 which the standard of good faith negotiation in 1113 is  
5 related to or overlaps with the standard of good faith  
6 negotiation in Section 109 or even, for that matter, the  
7 extent to which it overlaps with whatever the law of good  
8 faith negotiation is in labor law outside of bankruptcy. I  
9 think it would help me if anyone would be interested in  
10 briefing that subject. I'm not surprised. And there are  
11 really two distinct questions there. The one is is there  
12 this overlap, should there be this overlap, and, second, how  
13 might the law in those other circumstances, 1113 and labor  
14 law more generally, help to resolve the issue here of whether  
15 there was good faith negotiation.

16 MS. CECCOTTI: Your Honor, may we join with that  
17 effort as well?

18 THE COURT: Yes. The invitation is an open  
19 invitation.

20 MS. LEVINE: Thank you, your Honor. We accept the  
21 invitation, and if your Honor sets a deadline by which you'd  
22 like that brief, we will --

23 THE COURT: Oh, a deadline. I don't know. What's  
24 convenient for you all?

25 MS. CECCOTTI: After the 30th.

1 MS. LEVINE: Busy this week.

2 THE COURT: Got that.

3 MS. LEVINE: Two weeks? Is that sufficient, or is  
4 that too long?

5 THE COURT: Two weeks is fine with me.

6 MS. LEVINE: Thank you, your Honor.

7 THE COURT: All right. Two weeks from today then.  
8 I'll enter an order just so the record has it there.

9 MS. LEVINE: Your Honor, but moving past that, okay,  
10 so we have the -- we have the city saying that these are not  
11 negotiations and labor negotiators are supposed to glean that  
12 they are negotiations, and then we have labor negotiators  
13 taking a hard line at the initial proposal and the city  
14 accepting that then there can't be any negotiation and  
15 somehow or other this proves that the city acted in good  
16 faith or that the negotiations were impractical. We  
17 respectfully submit that's false. And not only is it false,  
18 but for the reasons that you've heard from some of the other  
19 folks already, we, too, sent requests to the city for  
20 additional information to understand what the ask was, what  
21 the savings -- what the proposed savings were, and for better  
22 information to understand, while it was a long slideshow, a  
23 little bit more about what the assumptions behind the  
24 proposal or the alleged proposal were so that we could, in  
25 fact, like in an 1113 context, truly engage in a meaningful

1 negotiation. And AFSCME itself, your Honor, just a mere 18  
2 months prior to the bankruptcy filing, on behalf of itself  
3 and with a coalition of 30 unions, did agree to a tentative  
4 agreement which resulted in substantial savings for active  
5 and retirees' benefits, and those were ratified by all of  
6 those respective unions but not implemented by the city. So  
7 I'd respectfully submit that not only was there an ability to  
8 negotiate in good faith over a period of just a couple of  
9 months, but there's a proven track record that on this side  
10 of the table, we have been able to actually do those  
11 negotiations and accomplish results, so if --

12 THE COURT: Why not implemented?

13 MS. LEVINE: You'd have to ask the city and the  
14 state, your Honor.

15 THE COURT: Okay.

16 MS. LEVINE: It does remain a mystery to us because  
17 it also included, for example, changes to the pension  
18 benefits on a go-forward basis, and to the extent that there  
19 are other or different issues that they needed to address  
20 now, those, too, should have been addressed through  
21 negotiations. What we seem to be hearing and what is also a  
22 very important point for the City of Detroit and for Chapter  
23 9 on a go-forward basis is that if you have legacy  
24 liabilities and you have to deal with retiree benefits, then  
25 you automatically get to say it's impractical, and I don't

1 have to show good faith at all. And we would respectfully  
2 submit that that would be a very sad place for the City of  
3 Detroit to take Chapter 9 and all cases on a go-forward  
4 basis.

5 We respectfully submit, your Honor, that the city  
6 can't meet its burden of proof and that it's not eligible in  
7 this case at this time to be a Chapter 9 debtor. Thank you.

8 THE COURT: Thank you.

9 OPENING STATEMENT

10 MR. ULLMAN: Good afternoon, your Honor. Anthony  
11 Ullman from Dentons. I'll be speaking for the Retiree  
12 Committee. But first Ms. Patek asked me to tell you that  
13 Exhibit 704 was the number of the joint public union --  
14 safety union's letter that she couldn't find previously --

15 THE COURT: Okay.

16 MR. ULLMAN: -- so I've done that. Your Honor, of  
17 course, we're here today on what the Court has identified as  
18 factual issues which arise in the context of eligibility,  
19 which the city has the burden of proof on. And you've heard  
20 an overview of a lot of the evidence that the objectors  
21 expect to bring to the hearing, much of it in chronological  
22 order. And what I'm going to try to do is put that in the  
23 framework of the legal issues that relate to eligibility and  
24 try to explain how the evidence that we expect to come out at  
25 the hearing fits in with those legal issues. I'm going to be

1 focusing, of course, on the issues that the Retiree Committee  
2 is advancing, which I think are common to most, if not all,  
3 of the objectors.

4           Now, it's the committee -- it's the committee's  
5 contention and the contention of the objectors in general  
6 that the city has failed to meet its burden of proof on a  
7 number of specific elements that it has to meet to be  
8 eligible for Chapter 9 and that it also has failed to meet  
9 its burden of showing that its filing has been made in good  
10 faith, and so what I'd like to do is kind of go through those  
11 elements serially and put into context our view of how the  
12 evidence falls into that and how the evidence should shape  
13 your view of the law and application of the law, and  
14 basically our points are as follows.

15           The committee itself, of course, doesn't contest  
16 that Detroit is a municipality, and the committee is not  
17 contesting insolvency, although AFSCME, of course, is, but we  
18 do contest that other necessary elements have been met. I  
19 mean specifically it's our contention that the city can't  
20 show that the emergency manager, first of all, was  
21 specifically authorized to make this Chapter 9 filing. We  
22 also contend that the city has failed to meet the eligibility  
23 criteria that are set out in 109(c)(5), and there are, of  
24 course, two prongs of that. We say the city has not shown  
25 that it negotiated in good faith, which was required under

1 Subprong (c) (5) (B). And we say the city can't show that the  
2 good faith negotiations were impracticable, which is a prong  
3 under Sub (c) (5) (C), and, finally, the committee says that  
4 the city cannot show that it filed its petition in good  
5 faith, which is required under 921(c).

6 So taking that from the top, this is, first of all,  
7 what Section 109(c) (2) requires, and it requires specifically  
8 that the city be specifically authorized or the person acting  
9 for the city be specifically authorized to be a debtor under  
10 state law, and we don't think the city can show this as a  
11 factual matter because in filing the Chapter 9 petition, the  
12 emergency manager did so with the specific intent of taking  
13 actions and achieving results that are prohibited by the  
14 Michigan state Constitution, namely the pension clause,  
15 Article IX, Section 24. And we believe that that renders the  
16 filing ultra vires, ineffective, and void, and this point  
17 also obviously ties in with the view that in filing the  
18 Chapter 9 petition, the emergency manager didn't act in good  
19 faith under Section 921(c), so what I'm going to do is review  
20 the evidence on the intent in filing, particularly relative  
21 to the pension clause, for both purposes of the specific  
22 authorization and good faith under 921(c) together.

23 Now, as the Court may recall, there's also another  
24 aspect that we've raised with respect to Section 921(c) and  
25 good faith, and that is what we contend are the misleading

1 statements and omissions that were made in connection with  
2 the Chapter 9 filing, and I'll deal with those later in the  
3 presentation.

4           So turning now to the emergency manager's intentions  
5 as regards the pension clause, we think that the evidence is  
6 very clear, and I'll summarize some of the key points. First  
7 of all, we know that Mr. Orr was made the emergency manager  
8 under PA 436, and that, of course, as you've heard, was the  
9 replacement law for PA 4, the prior emergency manager law  
10 which had given the emergency manager very broad powers and  
11 then was repealed by voter referendum, and PA 436 was passed  
12 in its place. And as we know, it was passed with a minor  
13 appropriation provision, and we believe that the evidence  
14 will show that that was intended to immunize the law from  
15 Michigan voter review and, in fact, was a strategy that had  
16 been devised and suggested by the Jones Day law firm itself.

17           Now, PA 436 was enacted in November 2002 with an  
18 effective date of March 2013, and it was against this  
19 background that the emergency manager, Mr. Orr, was selected  
20 for his post. Now, Kevyn Orr we know is a bankruptcy lawyer  
21 by trade. That, of course, in and of itself, doesn't prove  
22 anything, but the evidence will show that before becoming the  
23 emergency manager, he was a bankruptcy lawyer at Jones Day,  
24 and, as I believe the Court has heard, he participated in the  
25 pitch that Jones Day made to the city and to the state to get



1 its current assignment as restructuring counsel.

2 Now, we've already seen from Ms. Green's  
3 presentation that prior to the pitch that Jones Day made,  
4 which was in late January 2013, Mr. Orr was specifically  
5 asked about the availability and use of Chapter 9  
6 specifically relative to the City of Detroit, and the  
7 evidence will show that in connection with that pitch, the  
8 Jones Day team was not only focused on Chapter 9 but was also  
9 specifically aware of the Michigan state pension clause and  
10 had already thought of using Chapter 9 as a means to try to  
11 get around it.

12 Now, this is the cover of the Jones Day pitch book,  
13 and here's a slide from it which we're blowing up, and what  
14 it says specifically is that if needed, Chapter 9 could be  
15 used as a means to further cut back or compromise, quote,  
16 "accrued financial benefits," close quote, otherwise  
17 protected under the Michigan Constitution. And that  
18 quotation, "accrued financial benefits," I believe, are words  
19 that are lifted right out of the pension clause itself. So  
20 this is from the pitch book that Jones Day prepared, and, as  
21 we've said, Mr. Orr himself was a major player and part of  
22 the pitch book -- the Jones Day pitch team.

23 And the evidence further is that from his own review  
24 of the circumstances of PA 436 and PA 4, Mr. Orr concluded  
25 that the new law, PA 436, in reality, was nothing more than a

1 thin veneer -- those are Mr. Orr's words -- a thin veneer of  
2 a revision that's essentially a redo of the prior PA 4 that  
3 the voters had rejected and an end-run around the voter  
4 rejection. This is from an e-mail that Mr. Orr wrote, and I  
5 believe -- it's a little hard to read because we didn't blow  
6 that top part up, but I believe it's January 31 of 2013. And  
7 this is from one of the exhibits that was gone over with  
8 Mr. Orr in his deposition.

9 Now, central to the issue of bad faith and  
10 authorization is the Michigan Constitution's pension clause.  
11 I'll just put a copy of that up on the screen. And as we  
12 see, the same word, the financial -- accrued financial  
13 benefits, the same words that appeared in the Jones Day pitch  
14 book, are right there in the Constitution.

15 Now, the evidence will show that Mr. Orr was  
16 personally aware of the pension clause, and the evidence will  
17 also show that when he became the emergency manager, Mr. Orr  
18 took an oath requiring him to uphold the pension clause --  
19 the state Constitution, of which the pension clause is part.  
20 And this is from Mr. Orr's testimony where he acknowledged  
21 that, yes, he took the oath of office, and he solemnly swore  
22 to support the Constitution of the United States and the  
23 Constitution of this state; that is, of the State of  
24 Michigan. But the evidence will show that instead of  
25 adhering to the strictures of the pension clause, Mr. Orr

1 decided, contrary to his sworn oath, to engage in a course of  
2 action that was deliberately designed to thwart it through  
3 the vehicle of a Chapter 9 filing, and what I'm going to go  
4 through now are some highlights of what I think the evidence  
5 will show, some of which you've seen before, some of which  
6 you may not have.

7           Now, the evidence will show that as early as May  
8 2013, which was less than two months after he became the  
9 emergency manager, Mr. Orr made the decision to cut pension  
10 benefits that were owed to -- excuse me -- to retirees, and  
11 it will show that he understood that he was unable to  
12 identify any viable way to achieve that end just under state  
13 law. And the evidence will show that the emergency manager,  
14 therefore, decided to try to accomplish that end through the  
15 means of a Chapter 9 filing. And even more specifically, the  
16 evidence will show that the emergency manager decided to try  
17 to use Chapter 9, the Chapter 9 filing, as a vehicle  
18 specifically to, quote, "trump" the pension clause of the  
19 Michigan Constitution.

20           Now, this all came together in the proposal to  
21 creditors that the emergency manager made on June 14th of  
22 2013, and in his proposal the emergency manager made no  
23 pretense that he was intending to protect accrued financial  
24 benefits as is required and provided for in the Michigan  
25 Constitution. For example, here's an excerpt from page 109

1 where he specifically says that under this proposal, there  
2 must be significant cuts in accrued vested pension amounts  
3 for both active and currently retired persons.

4 And under this June 14th proposal, the emergency  
5 manager, in fact, said that the city would not make any  
6 further pension contributions on account of retirees. For  
7 retirees the defined pension benefits were to be cut entirely  
8 from the forecast of the city's expenses going forward as  
9 were the retiree healthcare benefits. And for active  
10 employees, they were being shown as switched from a defined  
11 benefit plan to a defined contribution plan with the level of  
12 the city's funding of the contributions slashed dramatically  
13 from the present levels. Now, for the actives, this is a new  
14 plan, and the contributions are being made only on a going-  
15 forward basis, so for the active employees' vested pensions  
16 under this proposal, no further contributions would be made  
17 for those either.

18 Now, the June 14 proposal, although it was very  
19 lengthy, well over a hundred pages, didn't mention anywhere  
20 in it the prospect or even the potentiality of a Chapter 9  
21 filing, but the evidence will show very clearly that the  
22 emergency manager understood that his proposal could not be  
23 implemented outside of the context of Chapter 9 specifically  
24 because of the pension clause and that he, therefore,  
25 intended to use Chapter 9 as a vehicle to, again, in his

1 words, trump that very clause, the Constitution's pension  
2 clause. And he's freely admitted that it's the state  
3 Constitution -- the pension clause and no other provision of  
4 the Michigan Constitution that the emergency manager was  
5 trying to trump. This is an excerpt from his deposition. I  
6 think you may have seen parts of this before, but he says --  
7 he goes on to say that -- he answers, "We don't believe  
8 there's an obligation under the state Constitution to pay  
9 pensions." He says, "Yes, that's right." He says, "No.  
10 I've made that statement many times." And then we go on to  
11 ask him, "And the state law that you were referring to as  
12 being trumped was Article IX, Section 24; isn't that right?"  
13 He says, "Yes. That's right." We asked, "Is there any other  
14 state law that you viewed as relevant to the pension -- to  
15 the pension issue that you were trying to trump?" He says,  
16 "No," there's no other state law that he's trying to trump.  
17 It's specific, the pension clause. This Chapter 9 filing was  
18 done specifically to try to get around the pension clause of  
19 the Constitution, and there's no other way to read the  
20 evidence on that. And these admissions also confirm the  
21 city's recognition that the pension clause, in fact, applies  
22 directly to what the city is trying to do through this  
23 Chapter 9 proceeding and that the pension clause is in direct  
24 conflict with what the emergency manager is trying to do here  
25 as regards pensions. There's no question about it. They are

1 trying to do something that they acknowledge is in conflict  
2 with the pension clause. If that weren't the case, there'd  
3 be no context in which the federal law could trump anything.  
4 There would be nothing to trump. There's a direct --

5 THE COURT: I don't mean to cut you off, but haven't  
6 we been through this?

7 MR. ULLMAN: To some extent, your Honor, and I'm  
8 trying not to repeat exactly --

9 THE COURT: Any extent to which we haven't?

10 MR. ULLMAN: Yes, I believe there is, your Honor.  
11 I'm trying to -- I'm trying to bring additional evidence to  
12 make the -- largely the same points but in a more summary  
13 fashion and then move on to the eligibility issues.

14 Now, the emergency manager did all this in  
15 circumstances where he himself has admitted that he was not  
16 aware of any court decision that allowed the use of a federal  
17 bankruptcy proceeding to trump a provision of the state law  
18 Constitution. And the emergency manager did this in  
19 circumstances where the Jones Day law firm itself had  
20 previously advised that the emergency manager's ability to  
21 cut pensions through Chapter 9 was, at best, uncertain. That  
22 comes from the Jones Day pitch book itself. They said it was  
23 uncertain. And he did this in circumstances where the  
24 emergency manager had been advised by the state attorney  
25 general that the pensions were protected under Michigan state

1 law and that what the emergency manager was doing in terms of  
2 trying to cut them was contrary to the Michigan Constitution.

3 And, finally, on this point, we think that the  
4 timing of the filing itself is very significant. You've seen  
5 already that there were -- there was state court litigation  
6 that was pending, and you've heard that there was a TRO  
7 hearing that was scheduled and that the hearing on the TRO  
8 was scheduled to take place on the 18th. And what the  
9 evidence shows -- I'm sorry. Yeah. It was on the 18th, and  
10 the evidence shows, as you've seen already, that the  
11 bankruptcy filing had been originally scheduled for the 19th  
12 and then had been moved up to go -- to coincide on the 18th  
13 immediately prior to when the TRO hearing was supposed to  
14 take place, and the evidence on that is as follows, and I'll  
15 just skip to this particular slide.

16 Mr. Orr was asked specifically about the timing of  
17 the filing of the bankruptcy petition and, in particular,  
18 about the timing relative to the TRO proceeding, he was  
19 asked, "Is there a particular reason why the filing was made  
20 when it was, at the time it was, other than to try to get a  
21 jump on the state court decision?" And the emergency manager  
22 answered that, to the best of his knowledge, there was no  
23 such reason.

24 So to sum up on all this, we think that it boils  
25 down to the simple proposition that a state actor who takes

1 actions that are intentionally designed to achieve results  
2 that are in plain violation and in direct odds with the state  
3 Constitution is not acting within the scope of his authority  
4 and is not acting in good faith, and we believe the evidence  
5 will show that that's the situation here.

6 I'm going to turn now to the issues of eligibility,  
7 and there are -- as we've said, there are two prongs here.  
8 The city can prove by -- the good faith negotiation or the  
9 impracticability issue either by showing that it engaged in  
10 good faith negotiations or by showing that those were  
11 impracticable.

12 Now, on the good faith negotiation prong, we believe  
13 the evidence is going to show two things. First of all, the  
14 emergency manager has argued that the presentations and  
15 discussions that followed his June 14th proposal to creditors  
16 constituted attempts at good faith negotiations. However,  
17 the evidence will show that at the time of the presentations  
18 and meetings, the emergency manager did not have what he  
19 believed was a plan of adjustment and specifically that the  
20 emergency manager himself viewed the June 14th proposal only  
21 as a proposal and not as a plan of adjustment. Now, we've  
22 heard this morning from Mr. Bennett that the city is  
23 apparently trying to backtrack on this now, but when Mr. Orr  
24 was questioned at his deposition, he not only acknowledged  
25 but was adamant that what he presented on June 14th, which



1 was the subject of the following discussions and meetings,  
2 was not a plan but merely a proposal that he had put out to  
3 seek the general creditor feedback. He said this very  
4 specifically. "We never called this a plan. We never called  
5 it a deal. We always called it a proposal." So it was never  
6 considered -- whatever the city is saying now, at the time  
7 that the proposal was made, which, of course, was well before  
8 we filed our pretrial brief, which is at the same period when  
9 Mr. Orr testified prior to the filing of our pre-trial brief,  
10 Mr. Orr was quite clear that what they put on the table on  
11 June 14th was not a plan of adjustment, was not intended as a  
12 plan of adjustment. It was just intended as a proposal,  
13 something to be discussed. And we believe this is important  
14 because under the clear -- what we believe is the clear  
15 weight of the law, in order for the negotiations that are  
16 referred to in Subpart (c) (5) (B) --

17 THE COURT: One second. I have been asked to ask  
18 you to move back from the mike just a bit.

19 MR. ULLMAN: Okay. Is that better?

20 THE COURT: Maybe a little bit more.

21 MR. ULLMAN: Little bit more?

22 THE COURT: There you go.

23 MR. ULLMAN: Okay. The reason this is important is  
24 because under Subpart 109(c) (5) (B), the negotiations that are  
25 referred to in that subpart have to be negotiations over what

1 is a plan of adjustment as that term is used in the  
2 Bankruptcy Code. The legal analysis on that, the authorities  
3 we cite are all in our brief, and I'm not going to repeat  
4 that here, but the point is that for the good faith  
5 negotiation prong to be met, the negotiations that have to  
6 be -- at issue have to take place over a plan of adjustment,  
7 and the evidence shows that per the emergency manager's own  
8 testimony in this case, no plan of adjustment was ever  
9 presented to the creditors, and so a fortiori the  
10 negotiations required under Subprong (c)(5)(B) never took  
11 place.

12           And so there's no confusion on this, I want to be  
13 clear that the question of whether the city presented the  
14 creditors with a plan of adjustment is a very different  
15 question from whether the city intended to impair or diminish  
16 protected pension payments. On the one hand, as I've gone  
17 through, the evidence will show that the city never presented  
18 creditors with anything that they considered a plan of  
19 adjustment, and on the other hand, as I've gone through and  
20 Ms. Green has summarized, the evidence will show that the  
21 emergency manager did intend to impair the protected pension  
22 benefits. In fact, this latter point is not even subject to  
23 question. The city has actually admitted in an RFA in this  
24 proceeding that's binding on it that it, in fact, intends to  
25 impair the pension rights as part of this proceeding, and

1 that's from the city's answer to the RFA that was served on  
2 it, Number 12, where they admit that the city intends to seek  
3 to diminish or impair accrued financial benefits. That,  
4 again, is the term that's used in the pension clause of the  
5 Constitution. So that's what the evidence will show on the  
6 existence of a plan of adjustment.

7 Now, we also believe and you've heard before that  
8 even if there were a plan of adjustment, even if there had  
9 been one presented, there were no good faith negotiations.  
10 For example, there was no way to know from the evidence --  
11 or, rather, from the information that was provided at the  
12 June 14 meeting how in actual monetary terms the individuals  
13 that the city sought to affect under the June 14 proposal  
14 would be impacted, and specifically in terms of both the  
15 proposed pension cuts and the OPEB where the city was saying  
16 that the retirees would instead get some share of notes,  
17 there was no way for the retirees to know what the cash value  
18 was of what the city was proposing. And, in fact, the  
19 evidence will show that for -- at least for retirees at the  
20 time of the discussions over the June 14 proposal, the time  
21 those discussions were proceeding, the city itself did not  
22 even know what the real size of the unfunded pension  
23 liability was. In other words, there was no way to know what  
24 the parties were even negotiating over. And here's some of  
25 the evidence quickly on the negotiations. First of all, the

1 emergency manager has admitted -- this is a question asked as  
2 regards to the June 14 meeting. We asked him, "Were there  
3 negotiations there?" His answer, "No. There were not  
4 negotiations. I'm going to be careful how I use the word,  
5 but no. As we generally use the word, there were none."

6           There were other meetings that then took place. The  
7 next meeting, as I recall, took place on June 20, and this is  
8 from a letter that Jones Day wrote, and it called them  
9 informational meetings and acknowledged that actives and  
10 retired employees will need access to additional information  
11 to analyze the proposals that are being -- that are proposed  
12 in the June 14th document. And here's another letter from  
13 Jones Day. This is dated, I believe, July 17th, and what it  
14 says is, "We think it first makes sense to try to reach  
15 common ground with the unions and associations on actuarial  
16 assumptions and methods and the amount of the underfunding."  
17 First we got to figure out what the amount of the  
18 underfunding is and then tackle the contributions and  
19 attendant benefit changes. You have to know what the size of  
20 the underfunding is before discussions can even take place,  
21 so, again, there wasn't even anything concrete to negotiate  
22 over.

23           And, finally, on this point, we believe the evidence  
24 will show the city never really intended to engage in good  
25 faith negotiations. I'm going to put this document up

1 briefly. I think we've gone through this before. This is a  
2 document from Bill Nowling of the emergency manager's office,  
3 and what he's basically saying -- this is as of July 8th --  
4 that they've already concluded what their key filing messages  
5 would be. July 8th they're saying it's impracticable. This  
6 is before the meetings that took -- that were scheduled for  
7 July 10th and 11 even took place. So what we can see is that  
8 even as the city was telling the world that it wanted to have  
9 more meetings, it had already internally and secretly decided  
10 that it would claim impracticability. So the meetings that  
11 were followed were really nothing more than an effort to  
12 create a record that would allow the city to claim good faith  
13 negotiations when, in truth, there were no real negotiations  
14 and the city wasn't negotiating, we believe, in good faith.

15 With respect to the impracticability prong, we  
16 believe the situation is similar. At the outset, as we've  
17 explained in our pretrial brief, the committee believes that  
18 the requirement that there be a plan of adjustment applies  
19 equally to the impracticability test, and this only makes  
20 sense because without an actual plan identifying who the city  
21 intends to impair and how, there's no way to assess whether  
22 negotiations would be practicable. And specifically, as  
23 we've said, the only document that was on the table was the  
24 June 14 proposal, and that was a proposal, not a plan.

25 And further, as we've set out, we believe and the

1 law is that to show impracticability, the city has to show  
2 impracticability with respect to each class of creditors. It  
3 has to try to negotiate with those with whom negotiations are  
4 possible, and, as you've heard, the evidence will show that  
5 we believe there were certainly a number of classes of  
6 creditors with whom that was possible. And as we saw from  
7 the last slide, the evidence indicates that the city really  
8 never intended to try to negotiate but really just tried to  
9 use impracticability as a tool to get out of it. So from a  
10 factual viewpoint, we believe the impracticability prong will  
11 not be met either.

12 Now, finally, I want to talk briefly about Section  
13 921(c), which is the good faith requirement. I've already  
14 addressed one aspect of the good faith, the emergency  
15 manager's pursuit of a course of action that's contrary to  
16 the pension clause of the Constitution, but there's also  
17 another aspect to it, and that is this, that we believe that  
18 in connection with his filing of the petition, the emergency  
19 manager made a number of misrepresentation -- or of  
20 representations that we believe the evidence will show were  
21 at minimum misleading and incomplete, and I'll give you some  
22 examples.

23 First of all, in his declaration -- this is the  
24 declaration that the emergency manager filed with the  
25 petition -- he stated that the city has over 18 billion in

1 accrued liabilities and including specifically over 6.4  
2 billion in bonds that are backed by enterprise revenues or  
3 otherwise secured. Now, that, of course, sounds like a huge  
4 liability for the struggling City of Detroit to bear, but the  
5 evidence will show that what's not stated in this is that the  
6 vast majority of these bonds that we see referred to here,  
7 the 6.4 billion, are bonds that are issued by the Detroit  
8 Water and Sewerage Department, which is operated as a  
9 separate authority and is fully responsible for the payment  
10 of those bonds. And the evidence will show that the  
11 Department of Water and Sewers itself has the financial  
12 wherewithal to make those payments. We put this question to  
13 the emergency manager in his deposition. He said, yes, the  
14 Department of Water and Sewers, it generates its own  
15 revenues, and it pays its debts as they come due. So right  
16 off the bat, the total liabilities that, according to the  
17 emergency manager, he has to struggle to meet are effectively  
18 reduced by at least a third.

19 Now, also in his declaration the emergency manager  
20 stated that in terms of the unfunded pension liability, that  
21 the unfunded pension liability is \$3.5 billion, and this is  
22 stated here as a fact, not subject to qualification, and as  
23 we all know, the unfunded pension liability -- how big it is  
24 and what, if anything, will be done about it, those are  
25 central issues that will have to be addressed if this action

1 proceeds, but for present purposes, the evidence will show  
2 that this \$3.5 billion number that Mr. Orr stated in his  
3 declaration is not a fact. We think the evidence will show  
4 that the fact is that at the time the petition was filed, the  
5 city did not know the actual size of the unfunded pension  
6 liability as its analysis on that was ongoing and hadn't been  
7 completed and, indeed, still hasn't been completed today.  
8 And this, for example, is from the deposition testimony of  
9 Charles Moore, who is the city's -- from Conway MacKenzie,  
10 which is the city's operational restructuring advisor. Mr.  
11 Moore also put in a declaration addressing unfunded pension  
12 liabilities, and at his deposition Mr. Moore candidly  
13 admitted that, in fact, the city didn't know what the actual  
14 amount of the unfunded liability was and that work was going  
15 on to try to make that determination. He says specifically,  
16 most importantly, the city's actuary has not completed its  
17 analysis on the unfunded position, and until that work is  
18 done, no one really knows what the unfunded liability is.  
19 And, indeed, we believe the evidence will show that the last  
20 full actuarial evaluation of the unfunded liability was done  
21 around June of 2011, and the unfunded amount that was shown  
22 in that evaluation was about 643, 644 million. And the  
23 evidence is also going to show that of that total amount, the  
24 644 or so, only about 250 million is allocable to the general  
25 fund, which is the fund that the city is most concerned



1 about, which it pays most of its bills. That is not a charge  
2 on the general fund. The evidence will show that a very  
3 large chunk of that is, in fact, allocable to other  
4 departments such as the Department of Water and Sewerage,  
5 which, again, is responsible for that and pays its own bills.

6 Now, during the -- Mr. Bennett's arguments, he  
7 suggested that we had somehow misstated what Mr. Orr said at  
8 his deposition, failed to cite all the appropriate parts.  
9 That's not accurate. At his deposition Mr. Orr was put  
10 through the numbers, and there was an initial error. He then  
11 corrected that arithmetic error. At the end of the  
12 deposition, Mr. Orr said that it appeared to his knowledge at  
13 that time the portion of the unfunded pension liability that  
14 was allocable to the Department of Water and Sewerage was  
15 about 68 percent. Mr. Bennett is suggesting that maybe 68  
16 percent isn't the right number, and the right number should  
17 be 38 percent. Be that as it may, 38 percent is still in  
18 this context a huge chunk of the unfunded pension liability,  
19 which is something that's borne by Department of Water and  
20 Sewerage and payable from those funds without any strain on  
21 the general fund. And the evidence will show that the  
22 emergency manager has acknowledged that even if the unfunded  
23 pension liability were ultimately found to be greater than  
24 the \$644 million number, even if it were found to be --  
25 excuse me -- as high as the \$3.5 billion number that you've

1 heard, that same principle would hold true, that there's a  
2 significant portion of it that is not allocable to the  
3 general fund but is borne entirely and payable by and fully  
4 funded by the Department of Water and Sewers. And as I said,  
5 the evidence will show that that department is solvent and  
6 capable of meeting its obligations, and, indeed, the Water  
7 and Sewerage pension payments even have priority over secured  
8 claims in that they're included in net operating expenses.

9           So we believe the evidence will show that the amount  
10 of the underfunding on the pension liability is not nearly as  
11 severe as -- still substantial -- we're not denying that, but  
12 not nearly as severe as was portrayed in the emergency  
13 manager's declaration.

14           And finally, related to all this, the evidence will  
15 show that the city does, we believe, have substantial assets  
16 that can be monetized. Chiefly but not alone among them is  
17 the art that's owned by the city that's maintained at the  
18 Detroit Institute of Arts, and we're talking about art that's  
19 owned outright by the city, not art that's subject to any  
20 charitable trust. And the evidence will show that there's  
21 that asset, and also the Department of Waters and Sewers is a  
22 valuable asset that could be monetized. The city may well be  
23 in a position to obtain substantial cash inflows from these  
24 assets and we understand is actively pursuing these  
25 opportunities. Those assets, those cash flows could

1 obviously be used to fund other obligations as well, yet none  
2 of that was factored in any way into the Orr declaration even  
3 though that could dramatically change the mix of what happens  
4 in terms of paying not only pension obligations but other  
5 obligations as well.

6 So that, your Honor, is what we believe the evidence  
7 will show. Based on that, we believe the city cannot meet  
8 its burdens of proving eligibility or good faith, and we look  
9 forward to proceeding. Thank you, your Honor.

10 THE COURT: Thank you.

11 MR. ULLMAN: Oh, and I do -- we will have a bound  
12 copy of the slides that I used for you marked. Thank you.

13 THE COURT: All right. Thank you.

14 MS. LEVINE: Your Honor, I apologize, but I got a  
15 flurry of e-mails after I stepped away from the podium saying  
16 two weeks, what are you, crazy?

17 THE COURT: What was your answer to that question?

18 MS. LEVINE: I have to ask the judge if I'm crazy or  
19 not. I guess --

20 THE COURT: I take it you're asking for more time.

21 MS. LEVINE: If we could have another week, your  
22 Honor, that would be --

23 THE COURT: Sure. Three weeks. Absolutely. Okay.  
24 So does that conclude your opening statements? All right.  
25 We'll take a recess now until ten after three, and we'll

1 begin with the evidence at that time.

2 THE CLERK: All rise. Court is in recess.

3 (Recess at 2:51 p.m. until 3:10 p.m.)

4 THE CLERK: Court is in session. Please be seated.

5 THE COURT: Okay. It appears everyone is here. You  
6 may proceed.

7 MR. STEWART: Thank you, your Honor. Geoffrey  
8 Stewart, Jones Day, for the city. Our first witness will be  
9 Gaurav Malhotra, but before we call him, I wanted to put on  
10 the record a stipulation that the parties have reached with  
11 regard to the sequestration of witnesses. We've agreed that  
12 witnesses should be sequestered with the exception of those  
13 who, by definition, are representatives of a party.

14 THE COURT: That's fine. I ask counsel, please, to  
15 supervise this sequestration because you know who your  
16 witnesses are.

17 ATTORNEY: Thank you, your Honor. We will.

18 THE COURT: Okay.

19 MR. STEWART: May we call Mr. Malhotra to the stand?

20 THE COURT: Yes, yes, of course. Step forward,  
21 please, sir. Before you sit down, please raise your right  
22 hand.

23 GAURAV MALHOTRA, DEBTOR'S WITNESS, SWORN

24 THE COURT: Please sit down. You may proceed, sir.

25 DIRECT EXAMINATION

1 BY MR. STEWART:

2 Q Good afternoon. Mr. Malhotra, could you please, for the  
3 record, give us your full name and your home address?

4 A Gaurav Malhotra, and I live in Chicago, Illinois.

5 Q And are you presently employed?

6 A Yes.

7 Q Who are you employed by?

8 A Ernst & Young.

9 Q And what is Ernst & Young?

10 A Ernst & Young is a Big Four accounting firm.

11 Q And how long have you worked for Ernst & Young?

12 A For close to four years since I recently joined.

13 Q In what part of Ernst & Young's practice do you work?

14 A Restructuring specifically.

15 Q And just for the record, tell us what that means when you  
16 say "restructuring"?

17 A Our practice predominantly represents corporations and  
18 public sector clients in order to assist with business plan  
19 assessments, liquidity analyses, as well as developing  
20 restructuring proposals.

21 Q Tell us, if you could, about your college education and  
22 any post-graduate education that you had.

23 A I went to college in New Delhi, India, and I did my MBA  
24 in Finance and Business Policy from Case Western, and I'm  
25 also a CFA.

1 Q Certified financial analyst?

2 A That is correct.

3 Q After you left Case Western, what was the first job that  
4 you had?

5 A I joined Ernst & Young.

6 Q And how long were you at EY at that point?

7 A At EY, I joined in May of 2000, and EY's restructuring  
8 practice was, I believe, in 2004, sold to Giuliani Capital  
9 Advisors. I transitioned with that team. That team was  
10 subsequently sold to Macquarie, an Australian investment  
11 bank, and I transitioned with that team and came full circle  
12 back to EY about four years ago.

13 Q And what is your title at EY now?

14 A I'm a principal.

15 Q And what does that mean?

16 A It's a non-CPA partner of the firm.

17 Q So you're an equity partner of EY?

18 A I am an equity partner of EY.

19 Q Could you tell us some of the clients you have worked for  
20 as part of your work in restructuring?

21 A I worked for Delta Airlines. I did work for Detroit  
22 Public Schools, doing work for Liberty Medical right now,  
23 worked at Collins & Aikman, and those are some of the clients  
24 that I've worked with in addition to others.

25 Q Did there come a time when EY was retained by the City of

1 Detroit to perform work for the city?

2 A Yes. We started our work in about the May, June of 2011  
3 time frame.

4 Q So over two years ago?

5 A That's right.

6 Q At the time the city approached you or at any time since,  
7 was EI -- EY -- sorry -- retained to serve as an expert for  
8 the city in any litigation, including Chapter 9 litigation?

9 A No. In fact, it's very clear in our letter that we will  
10 not serve as an expert.

11 Q What were you hired to do in May of 2011?

12 A Generally, it was to get a handle on the city's liquidity  
13 position and try and get our arms around in terms of the  
14 city's short-term liquidity forecast over the next 12 months  
15 or so.

16 Q And this was back in 2011. That was what you were asked  
17 to do?

18 A That is correct.

19 Q Did there come a time earlier this year when the scope of  
20 work the city asked of EY was expanded?

21 A Yes. In the front end of this calendar year, our role  
22 was expanded to look at a ten-year forecast for the city,  
23 predominantly on the general fund, and to ascertain what the  
24 deficit as well as cash projections would be over a longer  
25 time frame versus a shorter time frame.

1 Q Now, you just used the term "general fund."

2 A Yes.

3 Q What is the general fund?

4 A The general fund is basically where the day-to-day  
5 activities for a municipality are recorded. i.e., collection  
6 of taxes, payment of operating expenses and administrative  
7 expenses as well as debt service that is not related to an  
8 enterprise fund.

9 Q Why is the general fund a logical place to look when  
10 you're analyzing the city's financial position?

11 A Because that's where the tax revenues or the fees are  
12 recorded, so the enterprise funds specifically charge their  
13 own fees for that specific service, but the general fund is  
14 where the core operating deficit of a city is recorded in  
15 municipal accounting across the country.

16 Q Now, you've used the term a couple of times "enterprise  
17 funds." For the record, what are the enterprise funds? What  
18 are examples of the enterprise funds?

19 A Enterprise funds generally are -- have a specific fees  
20 that is charged for the services that are provided by that  
21 fund. It's generally break-even. For example, the Water and  
22 Sewer department is an enterprise fund of the city. The  
23 Detroit Department of Transportation is an enterprise fund of  
24 the city, although the Department of Transportation requires  
25 a subsidy from general fund, so it's not break-even.



1 Q Now, in your analysis of the city's financial position  
2 and of the general fund, did you take into account the  
3 enterprise funds?

4 A We looked at some of the cash activity of the enterprise  
5 funds back in 2011 but focused majority of our efforts on the  
6 general fund and those enterprise funds that require a  
7 subsidy from the general fund like DDOT, which is the  
8 Department of Transportation.

9 Q Now, in the course of your work, what materials or  
10 information from the city did you rely upon?

11 A We looked at a CAFR.

12 Q I'm going to stop you right there.

13 MR. STEWART: Can we put up Exhibit 6? And I  
14 believe, your Honor, the CAFR, which is Exhibit 6, has been  
15 stipulated into evidence.

16 BY MR. STEWART:

17 Q Is this the CAFR?

18 A Yes. That's the CAFR for 2012. It's the Comprehensive  
19 Annual Financial Report, which is the city's audited  
20 financial statements.

21 Q Those were audited?

22 A Yes.

23 Q By Ernst & Young?

24 A No.

25 Q And what does the CAFR tell you?

1 A It gives you a detailed snapshot of revenues and expenses  
2 as well as the deficit position of the general fund as well  
3 as some activity of the enterprise funds.

4 Q Is this a public document?

5 A Yes, it is.

6 Q What else did you look at in the course of your work to  
7 learn about the details of the finances of the city?

8 A We looked at the city's budgets. We looked at internal  
9 financial reports that we had access to from the city.

10 Q What kind of financial reports?

11 A They were generally department-specific revenues and  
12 expenses as we had available. We also looked at receipts and  
13 disbursements activity for different bank accounts to try and  
14 get our arms around the financial position of the city.

15 Q Now, were these materials you looked at records -- the  
16 financial records that the city had kept in the ordinary  
17 course of its business?

18 A Yes.

19 Q And in your experience, is it in the ordinary course of  
20 an enterprise or city's business to keep records such as the  
21 ones you were looking at?

22 A Yes.

23 Q And did the records appear to you to be accurate?

24 A Generally, yes. I mean there were always questions about  
25 assumptions like specifically on budgets, but we did not find

1 any material discrepancies at least in the information that  
2 we were trying to get our arms around specifically like the  
3 CAFR.

4 Q Well, what did you do to check the reliability of the  
5 information the city gave you?

6 A What we did is we looked at the information that was made  
7 available. We spoke to various members of the city's  
8 management team, the finance department at the city, various  
9 department heads. We looked at the receipts and  
10 disbursements activity as generally cash was a telling  
11 barometer in terms of the quality of information we were  
12 receiving, so we went through and tried to scrub the data to  
13 the best of our ability.

14 Q You just used the term "we." I should have asked you  
15 earlier how many people from EY worked with you on this  
16 project?

17 A On the front end of this engagement, we had a team of  
18 about four or five, and that team is larger now.

19 Q What deliverables were expected of E&Y as a result of its  
20 work?

21 A It was generally cash flow updates, whether they be short  
22 term or medium term, generally going out on a monthly basis,  
23 variance reports in terms of how the city was performing in  
24 context of those cash flows. As time progressed, our work  
25 expanded to helping develop the long-term projections in

1 conjunction with other members of the city, so we also helped  
2 in terms of updating the financial advisory board on a  
3 monthly basis in terms of where some of the cash position of  
4 the city was.

5 Q And in terms of organizing and presenting your data, what  
6 methods did you use?

7 A It was generally Excel spreadsheets or PowerPoint  
8 presentations.

9 Q Okay. And an Excel spreadsheet is what?

10 A It's a software that allows you to compile, organize, or  
11 make calculations in terms of the data that we have  
12 available.

13 Q And the calculations are arithmetical calculations?

14 A Yes.

15 Q Now, let me ask you this. Did there come a time when you  
16 learned that an emergency manager had been appointed for the  
17 City of Detroit?

18 A Yes.

19 Q And do you remember when you learned of it?

20 A Right around March.

21 Q And when did you meet Kevyn Orr for the first time?

22 A The first time I met Kevyn Orr was during the interview  
23 process of various law firms where Jones Day was one of the  
24 firms that was presenting its credentials to represent the  
25 city.

1 Q And after Mr. Orr was appointed as emergency manager, how  
2 often did you meet with him?

3 A Generally weekly.

4 Q And has that continued to this day?

5 A Yes, either meetings or phone conversations.

6 Q Okay. Are you aware of something called a 45-day report?

7 A Yes.

8 Q What is a 45-day report?

9 A It's a report that an emergency manager has to present 45  
10 days after his or her appointment to provide a snapshot of  
11 the financial and operating condition of the city.

12 Q Now, we put up on the monitor before you Exhibit -- I  
13 think it's 75 for identification. Is that the 45-day report?

14 A Yes, it is.

15 Q And you've seen this before?

16 A I have.

17 Q And do you understand why it was Mr. Orr was required to  
18 submit a 45-day report?

19 A I believe it's per statute under PA 436.

20 Q Did you yourself contribute any part of the content of  
21 the 45-day report?

22 A We did. We helped work on the financial section of the  
23 document as well as some short-term liquidity projections  
24 that were available as of that point in time.

25 Q Let me ask if we could go to page 40 of the --

1           MR. STEWART: And if we blow it up for the monitor,  
2 please, Lauren, so we can see it better --

3 BY MR. STEWART:

4 Q Mr. Malhotra, do you have that before you, page 40 of the  
5 report?

6 A Yes, I do.

7 Q And what is that?

8 A That is a snapshot of the monthly receipts and  
9 disbursements activity of the general fund and the cash  
10 balance available for the general fund along with any  
11 deferrals that we were able to identify as of that --

12 Q And is this a spreadsheet that you or someone at E&Y  
13 working at your direction prepared?

14 A Yes.

15 Q Without going --

16           MR. SHERWOOD: Your Honor, I'd just like to  
17 interpose an objection at this time.

18           THE COURT: Would you identify yourself, sir?

19           MR. SHERWOOD: I'm sorry, your Honor. I was  
20 introduced this morning. I'm Jack Sherwood from Lowenstein,  
21 counsel for AFSCME. I'm Ms. Levine's partner.

22           THE COURT: Okay. Go ahead, sir.

23           MR. SHERWOOD: I believe that this testimony in  
24 terms of forecasts of future performance by the city is  
25 improper lay opinion testimony and should be disallowed. We

1 submit that this testimony is in the nature of financial  
2 projections, requires special expertise, training, and so  
3 forth and under Federal Rule of Evidence 701(c) should be  
4 excluded. Thank you.

5 MR. STEWART: Well, your Honor, two responses.

6 THE COURT: Excuse me one second.

7 MR. STEWART: Yes. I'm sorry.

8 THE COURT: Is it the exhibit you object to or the  
9 testimony about it?

10 MR. SHERWOOD: Both, your Honor.

11 THE COURT: The exhibit is already in evidence;  
12 right?

13 MR. SHERWOOD: Well, then the testimony about it. I  
14 think it has been stipulated into evidence. I think this  
15 document is in evidence, but I do believe that any testimony  
16 about these projections is expert testimony and should be  
17 disregarded.

18 THE COURT: Sir.

19 MR. STEWART: Well, first of all, I don't believe  
20 the witness is going to be asked any opinion about this, and  
21 he has testified earlier he has not been hired as an expert.  
22 More fundamentally, I think the rule is clear that to the  
23 extent a witness, even one who has expertise, is simply  
24 performing arithmetic or similar calculations on voluminous  
25 data, it is not expert testimony, and I think the leading

1 Sixth Circuit case on that, your Honor, is -- I think it's  
2 the Madison case, 226 Federal Appendix 535, which is a 2007  
3 case, and it cites at length an Eleventh Circuit case that  
4 says that in greater detail and on the different facts, and  
5 so that is why I asked the questions I asked a few minutes  
6 ago about the source of the data, were they business records,  
7 what did he do with them. They went into a spreadsheet.  
8 What does a spreadsheet do? And at this stage I'm still  
9 trying to explain how he went about compiling his  
10 spreadsheets, but counsel is correct. I'm going to ask him  
11 at some point what were the results or the calculations. I'm  
12 not going to ask him his opinion on what anything ought to  
13 be. It is simply going to be, "After you compiled the  
14 information, as you testified, what did the number turn out  
15 to be?"

16 MR. SHERWOOD: Just briefly, your Honor. Anything  
17 that projects future revenues or forecasts is opinion. It's  
18 not fact. It's not adding numbers that exist. I understand  
19 that a fact witness can testify what our expenses and  
20 payments were on a given month or even that are due this  
21 month, but this is forecasting into the future in terms of  
22 not only expenses but also receipts, things like property  
23 taxes, utility taxes, various types of revenues going out  
24 through the end of this year, and I think that by definition  
25 that requires some type of expertise, specialized training,



1 certainly not something that anyone can do, is properly the  
2 subject of expert testimony and shouldn't be allowed.

3 MR. STEWART: And I think what the Sixth Circuit  
4 wrote, your Honor, was that there are many things that  
5 require expertise. For example, it requires expertise to  
6 read the records and know what part of the city's records are  
7 important. But where the calculations themselves do not  
8 require expertise beyond simple mathematics, it's not expert  
9 testimony. They distinguish being an expert and expert  
10 testimony.

11 THE COURT: What was the specific last question that  
12 you asked?

13 MR. STEWART: I believe it was how he went about  
14 preparing -- or his staff went about preparing the  
15 spreadsheet we see before us on the screen.

16 THE COURT: I'll permit that question.

17 BY MR. STEWART:

18 Q You may answer.

19 A The way we helped pull this spreadsheet together or any  
20 of the spreadsheets on the cash flows were we looked at the  
21 information that was available in the different budgets. We  
22 were able to look at the different receipts and disbursements  
23 on an actual basis in terms of what was actually coming into  
24 the city and break that down into the different categories  
25 and then, based on the assumptions that we had collectively

1 in conjunction with the city, forecast what the monthly  
2 receipts and disbursements could be over this forecast  
3 period.

4 Q And you populated the spreadsheet with those numbers?

5 A That is correct.

6 Q And you performed addition and subtraction on them to  
7 reach the conclusions that are shown here; is that correct?

8 A Yes.

9 Q And now may I ask you just as to this, what did you  
10 conclude the short-term cash flow forecast would yield to in  
11 terms of the city's available cash as of the end of calendar  
12 year 2013?

13 MR. SHERWOOD: I'd renew the same objection, your  
14 Honor.

15 THE COURT: That objection is sustained.

16 MR. STEWART: Okay.

17 BY MR. STEWART:

18 Q Mr. Malhotra, let me also ask you to look at -- actually,  
19 I'll come back to that in just one minute. Okay. Did there  
20 come a time, Mr. Malhotra, that you learned that the  
21 emergency manager had scheduled a meeting with creditors of  
22 the city for June 14 of this year?

23 A Yes.

24 Q And when did you learn of the meeting?

25 A It was right around, I think, in that June time frame.

1 Q And did you attend the meeting?

2 A I did.

3 Q Where was it held?

4 A At the Westin at the airport.

5 Q And how many people attended?

6 A I would say about a couple of hundred.

7 Q How long did it last?

8 A Four, five hours.

9 Q Did you speak or present anything at the meeting?

10 A I did.

11 Q Let me -- and were materials passed out at the June 14

12 meeting?

13 A Yes.

14 Q Let me first put up on the screen Exhibit 43. You see

15 Exhibit 43?

16 A I do.

17 Q Is that a document entitled "Proposal for Creditors" that

18 was distributed on June 14?

19 A It was.

20 Q And let's put up Exhibit 44. Is that an executive

21 summary of the proposal that was also distributed that day?

22 A That is correct.

23 Q Now, at that meeting -- this is entitled "Proposal for

24 Creditors."

25 A Yes.

1 Q That's the title of it. What's being proposed?

2 A What the city was proposing was a framework for  
3 restructuring of its long-term liabilities showing that the  
4 city was going to be unable to meet its obligations as they  
5 came due.

6 Q Now, I think you testified that you prepared certain  
7 parts of this document?

8 A That is correct.

9 Q Okay. And let me direct your attention, if I could, to  
10 page 8 of the document.

11 MR. STEWART: Can that be blown up, Lauren?

12 BY MR. STEWART:

13 Q Is this a spreadsheet that you or others at E&Y prepared?

14 A Yes, it was.

15 Q And what does it purport to show?

16 A The first column on that spreadsheet --

17 Q Well, first of all, what's the title of the spreadsheet?

18 A It says "Fiscal Year 2013 Forecasted Cash Flow to Year-  
19 End."

20 Q Now, it uses the term "fiscal year '13." What is the  
21 fiscal year of the City of Detroit?

22 A July 1 to June 30th.

23 Q So at the time of this meeting, the fiscal year '13 had  
24 about 16 days to go?

25 A Yes. June -- the month of June 2013 was still a

1 forecast.

2 Q So let's -- before we go further, let's look at our  
3 spreadsheet here. How many months of this spreadsheet are  
4 actual numbers?

5 A The first column has 12 months of fiscal year 2012, and  
6 subsequent to that 11 of the 12 months are actuals, and  
7 there's a month of forecast.

8 Q And that information you obtained from where?

9 A It was compiled from the information that was given to us  
10 by the city.

11 Q Okay. And what I'd like to do because we're going to be  
12 dealing with some of these issues later is to go over some of  
13 the elements of operating receipts and operating  
14 disbursements that we see here on the spreadsheet.

15 MR. STEWART: And I don't know if that can be blown  
16 up to be even larger or not, Lauren. I don't know if  
17 everyone can see them. Let's just blow up operating receipts  
18 if we could. There.

19 BY MR. STEWART:

20 Q I've asked the technical assistant here to blow these up  
21 so we can all see them better, and let me ask you about some  
22 of the operating receipts. Property taxes and income and  
23 utility taxes are just what they say they are?

24 A That's right. That's what they contain.

25 Q And gaming taxes, what are gaming taxes?

1 A Those are the taxes the city receives from the three  
2 casinos.

3 Q Next is municipal service fee to casinos.

4 A Those are generally additional fees that the city  
5 collects from the casinos for additional services that are  
6 provided.

7 Q And then our next line is state revenue sharing?

8 A That's state aid that the city receives every other  
9 month.

10 Q And below that we have other receipts. Could you tell us  
11 what the other receipts are?

12 A Sure. Those are a combination of fees from the different  
13 departments. It has grant revenue in there as well as any  
14 other one-time items that are also captured in there.

15 Q And the final item is called refinancing proceeds?

16 A Yes. Those generally reflect the monies that the city  
17 was borrowing from the escrow account that was set up with  
18 the state, so it was essentially additional debt borrowings.

19 Q Okay.

20 MR. STEWART: Let's go back if we could, Lauren, to  
21 the -- if you could just then expand for us the part of our  
22 chart that says "Operating Receipts." "Operating Receipts."  
23 That would still be the top part, I think. Now, "Operating  
24 Receipts," that would be the rows there entitled "Operating  
25 Receipts." Okay?

1 BY MR. STEWART:

2 Q Now, your spreadsheet purported to tabulate what the  
3 operating receipts were. I think the first column is actual  
4 for fiscal year '12. What did you determine the city's  
5 operating receipts had been for that fiscal year?

6 A For the general fund predominantly the operating -- total  
7 operating receipts were 1.765 billion of which 50 million was  
8 related to so-called proceeds from debt issuance or  
9 borrowings from the escrow fund.

10 Q And then for fiscal year 2013, you had 11 months actual  
11 and 1 month forecast; is that right?

12 A That is correct.

13 Q Okay. And can you tell me what your forecast was with  
14 those 11 actual and 1 forecasted month for --

15 MR. SHERWOOD: Object. I'm sorry.

16 BY MR. STEWART:

17 Q -- the operating receipts for fiscal year '13?

18 MR. SHERWOOD: Your Honor, I object to testimony  
19 based on forecasts.

20 MR. STEWART: Your Honor, what we have -- he spoke  
21 not only about the actual -- the city's actual receipts. He  
22 also spoke about the city's budgets not as a forecast he made  
23 but as a budget the city had, which was itself a factual  
24 document. To the extent he's talking about what the city has  
25 budgeted, especially when he tests it against actual

1 experience for reliability, I believe he can talk about what  
2 the forecast result is to look like. I would add that this  
3 is one where 11/12ths of the data is actuals that had, in  
4 fact, already come to pass.

5 THE COURT: Sir, is the number for the column  
6 forecast June 13 of 125 your number or the city's number?

7 THE WITNESS: It was generally a collaborative  
8 effort in which we used the numbers that were, your Honor,  
9 developed by the city originally. We scrubbed them along  
10 with the city.

11 THE COURT: What does "scrub" mean?

12 THE WITNESS: So we looked at, your Honor, the  
13 historical actuals in terms of how the amount of collections  
14 that were received in that particular month in conjunction  
15 and comparison with the overall tax row, so it was -- you  
16 know, actually, you are looking through the historical  
17 information that we had available as well as the best  
18 forecast information we had available to demonstrate what the  
19 one month of forecast would have looked like.

20 THE COURT: Well, all right. I'll permit the  
21 testimony as to the full year for actual and forecast but  
22 subject to credible admissible evidence regarding June '13.

23 MR. STEWART: Your Honor, we will provide that.

24 BY MR. STEWART:

25 Q And then, Mr. Malhotra, as to the full year operating



1 receipts for 2012, what did you calculate?

2 A For the full year of fiscal year 2013, the total  
3 operating receipts were -- with 11 months of actual and 1  
4 month of forecast were 1.582 billion, which included roughly  
5 \$30 million of borrowings from the escrow account as shown in  
6 the line item up above.

7 Q Okay. And so the line you're referring to is the line  
8 that says "refinancing proceeds"?

9 A That is correct.

10 Q And you better tell us what the escrow account is.

11 A It's an account -- escrow account that's set up that's  
12 subject to an escrow agreement between the city and the state  
13 where there are roughly about \$70 million of cash that is  
14 sitting in that escrow account today. It was projected that  
15 \$20 million of that 70 would have been collected, your Honor,  
16 in June of 2013, but that has not happened. We are  
17 anticipating to collect that \$20 million from the escrow  
18 account in the subsequent months going forward, but it is  
19 subject to -- the amount in there is subject to an escrow  
20 agreement between the city and the state.

21 Q Okay. Thank you. Lets, if we could, now --

22 THE COURT: Excuse me one second. So the 20 billion  
23 you're talking about is the 20 that's shown in forecast June  
24 '13?

25 THE WITNESS: Yes, your Honor. That's the 20

1 million.

2 THE COURT: That didn't happen.

3 THE WITNESS: That did not happen. That is correct,  
4 your Honor.

5 BY MR. STEWART:

6 Q At the time you wrote it, you expected that it would  
7 happen?

8 A That is correct.

9 MR. STEWART: Could we now expand the segment of the  
10 chart that talks about operating disbursements, just the  
11 title so we can see them all? No. That's fine.

12 BY MR. STEWART:

13 Q Now, we've now expanded on the screen, Mr. Malhotra, the  
14 segment of the spreadsheet that speaks of operating  
15 disbursements. Let me ask you if we could go through this.  
16 The first line is payroll taxes and deductions, and I assume  
17 that's self-explanatory. That's what it says.

18 A Yes.

19 Q Next is benefits. What are benefits?

20 A Those are generally health benefits.

21 Q Okay. Below that is something called pension  
22 contributions?

23 A That is correct.

24 Q And those are pension contributions to who?

25 A To either the police Retirement System or the General

1 Retirement System.

2 Q And those are both defined benefit plans?

3 A Those are defined benefit plans, yes.

4 Q Now, I understand that some portion of the benefits from  
5 the General Retirement System goes to city employees who work  
6 for the Department of Water and Sewer?

7 A That is correct.

8 Q And how do you account for that in this spreadsheet?

9 A Those are not accounted for here because this shows the  
10 activity predominantly of the general fund. The  
11 contributions that the Water and Sewer Department makes for  
12 pension go directly to the Retirement System and --

13 THE COURT: Excuse me, sir. You need to lean back  
14 away from the microphone a little bit because when you get  
15 too close, it cuts out.

16 THE WITNESS: All right.

17 THE COURT: And while we have a break here, I think  
18 your tech person needs to redo that chart because her effort  
19 to line up the headings isn't working very well separately.

20 MR. STEWART: Okay. Thank you.

21 THE COURT: That's better.

22 MR. STEWART: That's better. A little to the left,  
23 yes.

24 THE COURT: Thank you.

25 BY MR. STEWART:

1 Q We were talking, I guess, about pension contributions.  
2 Next we have -- and for actual year 2012, those had amounted  
3 to how much?

4 A For actual fiscal year '12, there were pension  
5 contributions of 103.9 million made by the general fund.

6 Q And for fiscal year 2013, what is the number?

7 A That reflects 11 months of actuals and 1 month of  
8 forecast, but about \$30.8 million of pension contributions  
9 that were made.

10 Q Why is that so much lower than the pension contributions  
11 that had been made in 2012?

12 A Because the city was trying its best to preserve  
13 liquidity during this time frame where liquidity was  
14 extremely tight and was deferring pension contributions.

15 Q Now, let's -- let me ask you about this. When you say  
16 "deferring pension contributions," what do you mean?

17 A It's essentially not making the scheduled payments as  
18 they came due and as were laid out by the city's other  
19 systems actuaries, so I would say it was more or less  
20 borrowing money from the pension system to fund ongoing  
21 operations.

22 Q So just to be clear, the money was owed to the pension  
23 systems; correct?

24 A That is correct.

25 Q But the city did not pay the pension systems the money it

1 owed them?

2 A That is correct.

3 Q And that is called deferral?

4 A Yes. That's what we are calling deferral.

5 Q And do you know looking at this what the amount of  
6 deferrals were for fiscal year 2013?

7 A For fiscal year 2013, I would say compared to the  
8 beginning of fiscal year 2012 there was probably another 70-  
9 odd million dollars that was deferred compared to the  
10 beginning of fiscal year 2012, an additional 70 million.

11 Q Okay.

12 THE COURT: And may I interrupt for one moment?  
13 Just so the record is clear and everyone understands, would  
14 you describe in more plain English what you mean by the  
15 concept of "liquidity was tight"?

16 THE WITNESS: Sure, your Honor. The city was during  
17 this time frame paying very close attention to its cash  
18 position, and in order to ensure that the city did not have a  
19 payless payday or run out of complete cash in its bank  
20 account, the amount of cash available for the city's general  
21 fund to continue to operate was dwindling. And in order to  
22 make sure that the cash position did not get to an  
23 unsustainable level where the core operations of the city  
24 were put at peril, that's what, your Honor, I meant by  
25 liquidity being extremely tight. It's the cash that was

1 available to run the operations of the general fund.

2 MR. STEWART: If we can go back to the full chart  
3 for just a minute, please.

4 BY MR. STEWART:

5 Q And before we go further, just on this same point, this  
6 chart is a projection of cash flow for the city for the past  
7 year and for fiscal year 2013; correct?

8 A It's actuals for --

9 Q Actuals and then -- okay. Now, you just talked about  
10 deferrals as something the city did to preserve cash. Is  
11 there something called pooled funds?

12 THE COURT: I'm sorry. Something called what?

13 MR. STEWART: Pooled funds. And I'm going to ask  
14 him what they are.

15 BY MR. STEWART:

16 Q Can you tell us what pooled funds are?

17 A The pooled funds are cash that has been available in  
18 other accounts for specific purposes such as the solid waste  
19 fund or the street fund or the risk management fund that has  
20 been pooled with the general fund cash so that the general  
21 fund cash is higher because of the result of the pooling of  
22 cash from these other accounts.

23 Q Now, these other accounts are not -- well, first of all,  
24 you better tell us what these other accounts are.

25 A As highlighted in the city's CAFR, the city had roughly

1 \$92 million of pooled cash from the solid waste fund, the  
2 street fund, and the risk management fund, cash that was  
3 combined with the general fund, that is currently reflected  
4 in the cash balances reported for the general fund.

5 Q And so that I understand, so because of the liquidity  
6 problems the city faced, it took the \$90 million out of the  
7 street fund, the solid waste fund, and the public safety or  
8 emergency fund and commingled it with money in the general  
9 fund?

10 A I don't know when it was done, but that would generally  
11 be yes. The commingling has probably happened some time ago,  
12 but the answer would be yes. It would be to further  
13 supplement the cash available for the general fund.

14 Q And if the city had not done that, what would have been  
15 the effect on its liquidity position?

16 A Well, at the end of fiscal year '12 where the cash net of  
17 distributions was shown as 1.9 million, if the city had to go  
18 ahead and segregate or unpool almost \$92 million, that cash  
19 net of distributions or cash available to the general fund  
20 would have been significantly lower dollar for dollar.

21 Q It would have been \$92 million lower?

22 A Yes. That is my understanding.

23 Q Let's go back now to our operating disbursements that we  
24 were talking about. All right. The next item there is  
25 something called subsidy payments. What are subsidy

1 payments?

2 A Subsidy payments are the cash payments that the general  
3 fund fund makes to DDOT, which is the Department of  
4 Transportation, because the Department of Transportation  
5 requires an annual subsidy every year from the general fund.

6 Q And below that we have distributions, and there are three  
7 different lines. There's distributions, tax authorities,  
8 then distributions, UTGO, and then distributions, DDA.  
9 Please tell us what those items are.

10 A Those are distributions to other taxing authorities. In  
11 the first line when we saw property tax collections, the city  
12 collects property taxes not only for itself but also on  
13 behalf of other taxing authorities like Detroit Public  
14 Schools, Wayne County, and what the city does then is once  
15 the gross property taxes are collected, it distributes to  
16 these other entities on behalf of whom the cash has come in.

17 Q So, in other words, it's cash the city has but that it  
18 has to turn over to someone else?

19 A Yes. That is correct.

20 Q And below that we have income tax refunds, account  
21 payables, and other disbursements and professional fees.

22 MR. STEWART: Now let's go back to the full chart if  
23 we could, and for purposes of simplicity, why don't we simply  
24 expand actual fiscal year '12 along with the descriptions of  
25 items that would help us walk through them? All the way to



1 the bottom. Thank you. Okay.

2 BY MR. STEWART:

3 Q Now, our next line has total disbursements. Do you see  
4 that?

5 A Yes.

6 Q And that's just the sum of all the operating  
7 disbursements?

8 A That is correct.

9 Q And below that there's something called net cash flow.  
10 What is net cash flow?

11 A That's the total operating receipts less the total  
12 disbursements.

13 Q And what was it for fiscal year 2012?

14 A It was negative \$65.5 million after including \$50 of  
15 proceeds from the escrow fund.

16 Q And why were those excluded?

17 A Those were already a part of the negative 65.5. Had they  
18 been excluded, the net cash flow would have been negative  
19 115.5.

20 Q I see. And then the next line is beginning cash balance,  
21 and what is that?

22 A That would be reflective of the cash balance the city's  
23 general fund had in its account including the pooled cash.

24 Q And you subtract from that the net cash flow that we just  
25 talked about; correct?

1 A Yes.

2 Q And we end up with cash before required distributions of  
3 \$29.8 million?

4 A That is correct.

5 Q And then there's something subtracted from that, and what  
6 is subtracted?

7 A Those are the accumulated property tax distributions, so  
8 when the city collects its property taxes, makes the  
9 distributions to the different taxing authorities -- excuse  
10 me -- there still is a holdback in terms of amounts that are  
11 being reconciled where the city and the different taxing  
12 authorities are going back and forth in terms of what the  
13 final amount is that is due to those authorities. That is  
14 the estimate that the city has available at that point of  
15 time in terms of additional monies that were due to these  
16 other taxing authorities but had not been paid yet, so we  
17 reserved for that cash that it will eventually be paid out.

18 Q Okay. What's an example of one of these other  
19 authorities that is owed to which the money has to be paid  
20 out by the city?

21 A It would include the Detroit Public Schools. It would  
22 include Wayne County. It would include the library. Those  
23 would be some of those examples.

24 Q And so our last line here says cash net of distributions,  
25 and that's \$1.9 million?

1 A That is correct.

2 Q And what does that represent?

3 A That would be the net cash available for the general  
4 fund, including pooled cash, that was available for the  
5 general fund's operations at that point of time.

6 Q At the end of --

7 A Fiscal year 2012.

8 Q -- 2012, which would be June 30th, 2012; correct?

9 A Yes.

10 Q And below you have something that says "memo," and the  
11 first line is accumulated deferrals?

12 A Yes.

13 Q Is that what you told us about earlier which were pension  
14 contributions the city owed but had not paid?

15 A That is correct, about 64.4 million.

16 Q And below that refunding bond proceeds in escrow, what  
17 are those?

18 A Those are the escrow account's amounts that were still in  
19 escrow and had not been drawn upon that were still subject to  
20 this escrow agreement with the state.

21 Q From the refunding financing that you told us about  
22 earlier?

23 A Yes.

24 Q And finally reimbursements owed to other funds, what is  
25 that?

1 A That is where we've highlighted the amounts -- or we  
2 haven't put an amount in off the funds that would subject --  
3 be subject to the unpooling of the cash that is shown in the  
4 general fund, but the city did not have a specific view in  
5 terms of when and how the unpooling of some of that cash  
6 would take place.

7 MR. STEWART: Now, if we could now highlight the far  
8 right column, which is the fiscal year 2013, it says 11(a)  
9 plus 1(f), and let's look at that. And then, Lauren, if you  
10 could put the categories next to it so he could --

11 BY MR. STEWART:

12 Q I'm going to ask you the same questions, but I'm going to  
13 be quicker when it comes to the fiscal year 2013. You  
14 already told us, I think, that the operating receipts were  
15 thought to be 1.52 -- 582.2 billion. What were the total  
16 disbursements expected to be?

17 A 1.5 --

18 MR. SHERWOOD: Objection.

19 MR. STEWART: This is the same point I think we  
20 argued earlier.

21 THE COURT: What is the objection, please?

22 MR. SHERWOOD: The objection --

23 THE COURT: Excuse me one second. And I've been  
24 asked to ask you to pull that microphone closer to you when  
25 you speak. Closer, closer, closer.

1 MR. SHERWOOD: I object --

2 THE COURT: Closer yet, please, sir. There you go.

3 MR. SHERWOOD: Okay. I object based on the fact  
4 that the disbursements include projections for June of 2013,  
5 and that requires expert testimony. That's improper lay  
6 opinion testimony.

7 THE COURT: All right. Subject to the same  
8 condition I indicated earlier, the Court will permit this.  
9 Go ahead.

10 BY MR. STEWART:

11 Q And to repeat the question then, the total disbursements  
12 for fiscal year 2013 are shown to be what here?

13 A 1.578.2 billion.

14 Q And so the net cash flow for the city in fiscal 2013 was  
15 how much?

16 A \$4 million positive.

17 Q And then we had cash before required distributions of how  
18 much?

19 A Before required distributions, \$33.8 million.

20 Q And then cash net of those distributions for fiscal year  
21 2013 came to what?

22 A \$14.1 million.

23 Q And by then, what was the accumulated -- was the amount  
24 of accumulated deferrals, and what was owed to the pension  
25 funds?

1 A By then the amount of accumulated deferrals predominantly  
2 due to the pension funds had increased from roughly \$65  
3 million at the end of fiscal year 2012 all the way to \$118.7  
4 million at the end of fiscal year 2013.

5 Q And where did the number come from in terms of what was  
6 owed to the pension funds?

7 A The amount of funding that would have been scheduled for  
8 the General Retirement System and the Police and Fire  
9 Retirement System would have come from the payments that the  
10 actuaries of the systems had suggested to be made but had not  
11 been made over the course of this time frame. That was  
12 predominantly what -- where those numbers came from.

13 Q So the numbers came from the pension plans themselves or  
14 their actuaries.

15 A The schedule came --

16 MR. SHERWOOD: Objection. Hearsay. Move to strike.

17 MR. STEWART: He can know this.

18 THE COURT: The objection is overruled. It was,  
19 however, a leading question.

20 MR. STEWART: It was, your Honor. I was trying to  
21 clarify, but let me ask it again.

22 BY MR. STEWART:

23 Q Where, if anywhere, did these numbers come from?

24 A The accumulated deferral number, which predominantly is  
25 made up of the pension deferrals, would have been a sum of

1 the pension payments that were not made during the course of  
2 fiscal year 2013 and it would have been in the amount of the  
3 scheduled payments the systems actuaries had suggested that  
4 should have been made on a monthly basis but were not.

5 Q So who is it who tells the city how much the pension  
6 payments ought to be?

7 A It's the system's actuaries.

8 Q The system being the General Retirement System and the  
9 Police and Fire Retirement System; correct?

10 A That is correct.

11 Q Did there come a time when you spoke with Mr. Orr about  
12 what you had found in the course of this analysis?

13 A We showed Kevyn Orr in terms of what the actual activity  
14 was and the magnitude of the deferrals that were taking place  
15 to sustain the city's cash position on a monthly basis.

16 Q Do you remember what you said to him and what he said to  
17 you?

18 A Not specifically, but it was generally showing as to what  
19 the magnitude of the -- what the magnitude of the dire  
20 liquidity position of the city.

21 THE COURT: I'm sorry. What? The magnitude what?

22 THE WITNESS: How dire the --

23 THE COURT: I didn't hear what you said. What did  
24 you say?

25 THE WITNESS: Your Honor, I said the dire liquidity

1 situation of the city.

2 BY MR. STEWART:

3 Q Let me -- let's now go to page 9 of this same exhibit,  
4 and the control number on this, if that makes it easier, ends  
5 with 7289. And could you just tell us what this is?

6 A This is the fiscal year 2014 forecasted cash flow to  
7 year-end on a monthly basis.

8 Q And is this a document you or others at Ernst & Young  
9 prepared?

10 A Yes, it is.

11 Q Did you show it to Mr. Orr?

12 A Yes, we did.

13 Q Did you discuss it with Mr. Orr?

14 A Yes. We discussed the receipts and disbursements  
15 activity, yes.

16 Q As shown in this document?

17 A That is correct.

18 Q And do you remember what you said to him and he said to  
19 you?

20 MR. SHERWOOD: Your Honor, object to the extent that  
21 the question calls for testimony about these forecasts. This  
22 document -- this particular page relates to 2014, which is  
23 all projections.

24 MR. STEWART: And that's why I'm asking the  
25 questions I'm asking, only was this shown to Mr. Orr and did



1 he discuss it with him, and I won't go any deeper into it  
2 right now.

3 MR. SHERWOOD: I didn't object to those questions.

4 THE COURT: No. I believe the witness can testify  
5 as to what he said to Mr. Orr about these documents. It goes  
6 to what Mr. Orr knew or at least what he was advised of at  
7 the time, so just tell us what you said to him about these  
8 documents or this document.

9 THE WITNESS: Your Honor, my recollection what I  
10 would have said on this particular document would have been  
11 that the fiscal year two thousand --

12 THE COURT: Well, hold on. Are you reconstructing  
13 what you would have said, or are you remembering what you did  
14 say?

15 THE WITNESS: Your Honor, I am trying to recall what  
16 I would have said. I do not remember specifically what I  
17 would have said.

18 THE COURT: All right. If you don't know the answer  
19 to a question, just say that. Don't guess or try to  
20 reconstruct.

21 THE WITNESS: Yes, your Honor.

22 THE COURT: Okay.

23 BY MR. STEWART:

24 Q Did you provide this document to Mr. Orr?

25 A I did.

1 Q Did there come a time that he raised it with you?

2 THE COURT: I'm sorry. Was there what?

3 BY MR. STEWART:

4 Q Did there come a time when Mr. Orr raised this document  
5 with you? Did he call you up or ask to have a conversation  
6 with you about it that you can remember?

7 A We had several discussions about this particular document  
8 and the overall contents of the numbers, yes.

9 Q And my only question to you is going to be, if you  
10 remember, what did you say to him, and what did he say to  
11 you, just that?

12 A What I would have said on this particular document --

13 Q Not would have said, what you did say if you remember,  
14 and if you don't remember, just tell me you don't remember.

15 THE COURT: If you don't remember, just say that.

16 THE WITNESS: I don't remember specifically what I  
17 would have said to Mr. Orr on this particular page in a  
18 specific conversation around that, but --

19 BY MR. STEWART:

20 Q Then let me ask the question a different way. In the  
21 time frame around June 14, did you have discussions with  
22 Kevyn Orr about the liquidity situation of the city?

23 A I did.

24 Q And do you remember what you said to him about the  
25 liquidity situation of the city?

1 A I do.

2 Q And will you tell us what you told him?

3 A The point -- what I said is that the fiscal year '14 cash  
4 receipts could fall short of cash disbursements to the tune  
5 of \$185 million.

6 Q What did he say to you?

7 A I do not remember specifically about what he said to me  
8 directly.

9 Q Let's go, if we could, now to another page of this, page  
10 47, which has control number 227327. Could you just tell us  
11 the -- what this document is? What's the title of this  
12 document?

13 A "Ten Year Projections for the General Fund Only on the  
14 Steady State."

15 Q And what is a steady state?

16 A The steady state would have reflected no restructuring of  
17 the city's long-term obligations or legacy liabilities.

18 Q I'm not going to ask you about the content of this, but  
19 I'm going to ask you to tell us how you prepared it.

20 A The way we prepared this is through different line items  
21 in terms of the revenue assumptions. We looked into  
22 specifically the overall State of Michigan forecast. We  
23 looked at the historical information with respect to the City  
24 of Detroit. We also went ahead and looked at analyses in  
25 terms of what the property taxes recently were for the city

1 and what the -- where the City of Detroit was faring in  
2 conjunction with the State of Michigan to come up with a  
3 forecast in terms of what the assumptions were for the  
4 revenue and property tax and income tax assumptions over the  
5 next ten years. We did it in conjunction with the management  
6 team of the city. We went through income taxes in a great  
7 level of detail between residents and nonresidents,  
8 corporations, to build up assumptions from the standpoint of  
9 what the revenues would look like over the next ten years.  
10 We looked at the casino taxes with respect to all three  
11 casinos, what their growth had been historically, where they  
12 were projected to be in the future, state aid. We got those  
13 numbers directly from the budget department of the State of  
14 Michigan in terms of where they saw the overall sales taxes  
15 that were due to the city were projected to be over the next  
16 ten years. That's generally how we came up with the revenue  
17 forecast, and I can highlight how we went through the  
18 expenses as well.

19 Q Well, yes, if you could, the expense and, finally, the  
20 legacy cost without getting into what the numbers actually  
21 are, just what your methodology was.

22 A With respect to the salaries, wages, and overtime, we  
23 started with what the current wage levels and the headcount  
24 was. It was built up by department to try and ascertain what  
25 the exact headcount was by department. From there on we had

1 fairly simplistic assumptions with respect to wage level  
2 increases of two percent on a year-over-year basis over the  
3 forecast period. For the health benefits for the active  
4 employees, we used assumptions that the city's health  
5 actuaries have developed on a per head basis, which is what  
6 we used based on a per headcount basis to extrapolate over  
7 the next ten years. On the other operating expenses, it was  
8 developed by individual department to look at every single  
9 department, their budgets, to help ascertain what were the  
10 ongoing operating expenses of each one of those departments  
11 on a ongoing basis.

12 MR. DECHIARA: Objection, your Honor. Peter  
13 DeChiara of Cohen, Weiss & Simon for the UAW. We object to  
14 this.

15 THE COURT: Are you pulling your microphone nice and  
16 close for me, please?

17 MR. DECHIARA: Objection based on relevance. The  
18 only relevance it would have to how this witness performed  
19 these numbers would be if the numbers were coming in for the  
20 truth of the matter. Otherwise it has no relevance.

21 THE COURT: I'm concerned about that, Mr. Stewart.  
22 First of all, just so the record is clear, what exhibit  
23 number is this page 47 of?

24 MR. STEWART: It is Exhibit 44.

25 THE COURT: All right. So the --

1 MR. STEWART: 44 is in evidence.

2 THE COURT: Right. So the question is what weight  
3 is page 47 of this exhibit entitled to --

4 MR. STEWART: Correct. It goes to weight.

5 THE COURT: -- if the witness has not been qualified  
6 as an expert?

7 MR. STEWART: Well, Judge, what I was going to do  
8 was lay a greater foundation for how it was put together, and  
9 then I was going to simply ask the witness this question,  
10 which I will ask him now.

11 BY MR. STEWART:

12 Q Where in here, Mr. Malhotra, did you insert your own  
13 personal assumptions?

14 A All of the assumptions were done in collaboration with  
15 the city.

16 Q Well, where did the numbers come from?

17 A The numbers came from either the actuaries that we were  
18 working with with the city or the city's debt documents with  
19 respect to the long-term liabilities of the city or, in terms  
20 of the revenues, it was assumptions that we worked on in  
21 conjunction with the city.

22 MR. DECHIARA: Your Honor --

23 MR. STEWART: And so, your Honor, my point on this  
24 is the following. The fact something is a future projection  
25 does not make it an opinion in the sense of being an expert

1 opinion. If one is relying on numbers from another source --  
2 in this case, all the sources Mr. Malhotra told us about --  
3 it is their numbers, not his numbers but their numbers, and  
4 what he is doing is tabulating them and calculating them.

5 THE COURT: I heard him say that at least some  
6 portion of this, which he didn't specify, was done in  
7 collaboration.

8 MR. STEWART: Well, let me -- but that's why I asked  
9 him this other question about which of these --  
10 collaboration, and I will ask him this --

11 MR. DECHIARA: Your Honor, may I be heard?

12 THE COURT: One second.

13 MR. STEWART: It sounded from his testimony he met  
14 with him and worked with him to learn the numbers. When I  
15 asked him which assumptions were his assumptions, not the  
16 assumptions of the people who gave him the numbers, the  
17 answer were they're not his assumptions.

18 THE COURT: His answer was, "We collaborated."

19 MR. STEWART: Well, I thought -- maybe I heard  
20 him -- I must have heard him differently than your Honor  
21 heard him. I thought the answer -- well, should we ask him  
22 again?

23 BY MR. STEWART:

24 Q Mr. Malhotra, of these numbers, which ones are your  
25 assumptions?

1 A EY has made no assumptions that these are EY's numbers.

2 I want to make that -- that's what I'm making clear.

3 Q So these numbers came to you from who?

4 A The numbers with respect to -- there are a lot of numbers  
5 on this page. The numbers with respect to all of the debt  
6 service would have been picked up from the city's CAFR. The  
7 numbers on the health benefits or pension retiree  
8 contributions would have come from the city's actuaries. The  
9 numbers for the actual headcount for all of the departments  
10 and the associated costs would have come from the city and  
11 its departments. The numbers with respect to the health  
12 costs for the active employees on a per head basis would have  
13 come from the city's actuaries. The numbers with respect to  
14 state revenue sharing would have come from the state  
15 directly. The numbers for property taxes, income taxes, and  
16 wagering taxes, those numbers, in terms of the assumptions,  
17 were validated, collaborated, between our team and the city  
18 in terms of the assumptions behind the revenue assumptions.

19 Q When you say "assumptions," you mean --

20 THE COURT: One second.

21 BY MR. STEWART:

22 Q -- the number that's there?

23 THE COURT: I need to hear from counsel at this  
24 point.

25 MR. STEWART: Okay. Go ahead.



1           MR. DECHIARA: Your Honor, to the extent the  
2 information in this exhibit comes from actuaries who are not  
3 on the witness stand, those numbers are hearsay and should  
4 not come in.

5           THE COURT: Well, but the document is already in  
6 evidence.

7           MR. DECHIARA: Your Honor, and also I would say,  
8 too, the witness is testifying about a process that took a  
9 high degree of expertise. I don't think I or most of the  
10 people in this room, let alone the man on the street, would  
11 be able to take these raw data and convert them into ten-year  
12 projections. It took the sophisticated work of an Ernst &  
13 Young team to put it together. This is in the nature -- this  
14 is the very essence of expert testimony.

15          THE COURT: I agree. I do.

16          MR. STEWART: All right. Your Honor, what we may  
17 ask leave to do is to submit perhaps a memoranda raising this  
18 with your Honor later on so we can move on now.

19          THE COURT: You may, of course.

20          MR. STEWART: Yeah. Okay. Your Honor, since --

21          UNIDENTIFIED SPEAKER: May I ask you --

22          MR. STEWART: Yes. Your Honor, one other thing.  
23 Since it's in evidence, I assume I am allowed to at least ask  
24 the witness what it says, and objections go to weight.

25          THE COURT: Well, it's duplicative to do that, but I

1 suppose to make a point you could ask briefly for the witness  
2 to review what it says.

3 MR. STEWART: Well, I'm going to just ask him to  
4 look at the far right column, and then I'm going to -- pardon  
5 me, your Honor. I'll move on to my next question.

6 MR. RUEGGER: Excuse me. Objection. Arthur Ruegger  
7 from Dentons on behalf --

8 THE COURT: I need you to move that microphone  
9 closer, sir.

10 MR. RUEGGER: I'll try, Judge. Is this better?

11 THE COURT: Hold the base closer.

12 MR. RUEGGER: Don't spill the water.

13 THE COURT: There you go. Much better. Much  
14 better. Thank you.

15 MR. RUEGGER: Your Honor, we submit the document  
16 speaks for itself. Any further narrative from this witness  
17 is in the nature of asking for his expertise on that.

18 THE COURT: Well, it doesn't take an expert to read  
19 it, so I'll permit it.

20 MR. RUEGGER: Very well, your Honor.

21 MR. STEWART: Could we simply blow up the far right  
22 column?

23 BY MR. STEWART:

24 Q As a result of your calculations, Mr. Malhotra, what did  
25 your spreadsheet conclude was the ten-year adjusted deficit

1 the city was facing?

2 A The spreadsheet would have said that revenues would be  
3 10.4 billion, operating expenditures would be 7.4 billion,  
4 and legacy expenditures would be 7 billion over this ten-year  
5 time frame for a surplus/deficit of almost \$4 billion, a  
6 negative \$3.93 billion.

7 Q All right. So did there come a time when you sat down  
8 with the emergency manager to talk about these projections?

9 A Yes.

10 Q Now, in preparing the projections, what did you do to  
11 make them as accurate as you knew how to make them accurate?

12 MR. SHERWOOD: Objection. Calls for analysis of  
13 projections that have been --

14 THE COURT: I'm sorry, sir. I can't hear you.

15 MR. SHERWOOD: Objection. Calls for improper  
16 opinion testimony. These are -- he's being asked to testify  
17 about projections that are properly the subject of expert  
18 testimony.

19 MR. STEWART: I think I asked him what he did to try  
20 to be accurate.

21 THE COURT: No. The objection is sustained.

22 MR. STEWART: Okay.

23 BY MR. STEWART:

24 Q In your conversations with Mr. Orr, what did you say to  
25 him about your ten-year projections?

1 MR. SHERWOOD: Same objection.

2 THE COURT: That objection is overruled. Please  
3 answer.

4 THE WITNESS: What we said is that if you look at  
5 simply the operating --

6 THE COURT: You said --

7 THE WITNESS: I said.

8 THE COURT: You said, "we said."

9 THE WITNESS: What I said is if you look at the  
10 total operating revenues and the total operating  
11 expenditures, the city still has a surplus of roughly \$3  
12 billion. However, when you layer in the legacy costs of  
13 roughly \$7 billion over the next ten years, the city has a  
14 deficit of almost \$4 billion over that ten-year time frame.  
15 BY MR. STEWART:

16 Q And what did he say to you?

17 A I don't remember specifically about what he said back to  
18 me.

19 Q Now, June 14 was the date of a meeting we've been -- I've  
20 been asking you about, I believe. This document was a  
21 document passed out that day; correct?

22 A Yes.

23 Q Before moving on from the meeting, let me ask you this.  
24 Were questions asked by anyone at that meeting on June 14?

25 A Yes. There were questions asked.

1 Q Do you remember any of the questions that were asked or  
2 who asked them?

3 A I don't know who asked them, but there were questions  
4 about the assumptions and the liquidity position of the city.

5 Q And am I correct in understanding that when you addressed  
6 the people attending that meeting that day, you were speaking  
7 about the spreadsheets I've asked you about this afternoon?

8 A That is correct.

9 Q And were questions asked of you then about those  
10 spreadsheets?

11 A There were -- yes, there were questions about it.

12 Q Okay. Let me move to another subject. You're aware of a  
13 security called the certificates of participation --

14 A Yes.

15 Q -- or sometimes called pension obligation certificates?

16 A Yes, I am aware.

17 Q For the record, can you tell us what those are?

18 A Those are -- certificates of pension are the funds that  
19 the city borrowed back in about 2005 to help fund the  
20 underfunding on the two pension systems.

21 Q And did the city have obligations to service the interest  
22 or principal of those securities?

23 A Yes.

24 Q And do you know what the city's obligation was?

25 A As of June of 2013, the city had a \$40 million payment

1 that was due to those -- on behalf of those POC's.

2 Q And what did the city do with respect to that payment?

3 A The city did not make that payment.

4 Q The city defaulted on it?

5 A Yes. That is correct.

6 Q What effect did that default have upon the city's cash  
7 position?

8 A It improved the cash position by \$40 million at the end  
9 of -- June 30, 2012.

10 Q What conversations, if any, did you have with the  
11 emergency manager or his advisors on the subject of the  
12 decision to default on the COPs?

13 A I do not recall of a specific discussion with Kevyn Orr  
14 on defaulting on the swaps.

15 Q Let's move on to another set of meetings. Did you attend  
16 meetings held on June 20th, 2013, with representatives of the  
17 pension plans?

18 A I do.

19 Q And am I correct in remembering there were two meetings  
20 that day?

21 A That is correct.

22 Q The morning meeting was with the nonuniformed pension  
23 plan, the GRS?

24 A Yes.

25 Q And the afternoon meeting was with who?

1 A With police and fire.

2 Q Okay. And we have put up the first exhibit -- I believe  
3 this is in evidence -- Exhibit 48. Can you tell me what  
4 Exhibit 48 is?

5 A It's the presentation that was used for the meeting with  
6 the nonuniform retirees on June 20th.

7 Q And let's go back. Just ask you a question. Towards the  
8 back of this, are there projections that were included in  
9 here that you or Ernst & Young had prepared? Let's look at  
10 page 4 and page 5. Are these projections you prepared?

11 A Page 4 was a summary of the legacy expenditures,  
12 historical, actual, and forecast. That would have been  
13 information on the pension and health benefits we received  
14 from the city's actuaries.

15 Q Okay. And the next page?

16 A Page 5 was the ten-year projections for the general fund  
17 only under a restructuring scenario that highlighted claims  
18 or amounts that were available to service unsecured claims.

19 Q Now let's go back to the meeting itself. How long did  
20 the morning meeting last?

21 A Probably about three hours.

22 Q And who was there?

23 A It was the city's advisors along with the members from  
24 the -- some retirees and some of the members from the  
25 Retirement System.

1 Q Were questions asked?

2 A There were some questions asked.

3 Q Do you remember the questions?

4 A They were questions about the cash position of the city.  
5 They were questions about the city's ability to make any  
6 changes to specific legacy liabilities.

7 Q Do you remember any questions being directed to you?

8 A They were -- yes. I remember questions that came up with  
9 respect to the cash flows of the city.

10 Q And do you recall who in particular asked you those  
11 questions --

12 A No, I don't.

13 Q -- or what you said in response to them?

14 A No, I don't.

15 Q Was Mr. Orr there that day?

16 A He was not.

17 Q Let's go to the next exhibit, if we could, which is  
18 Exhibit 49. Is this the handout that was given in the  
19 afternoon meeting?

20 A Yes, it was.

21 Q And tell me about the afternoon meeting. First of all, I  
22 should have asked where these meetings were held.

23 A These meetings were held at City Hall.

24 Q And how long did the afternoon meeting last?

25 A About two or three hours.



1 Q Who attended?

2 A It was the city's advisors along with some  
3 representatives from the Retirement Systems as well as I  
4 thought some active employees.

5 Q And, once again, if you look towards the back, are there  
6 portions of this document that was prepared by you or someone  
7 else at E&Y?

8 A Yes. We helped pull together pages 4 and 5 for this  
9 particular presentation.

10 Q Okay. Now, page 4, which we have, has legacy  
11 liabilities, some for fiscal years that have already ended --

12 A That is correct.

13 Q -- and others that are projected?

14 A Yes.

15 Q And where did your numbers come from for these?

16 A The debt service numbers, the scheduled debt service, as  
17 the amortization tables exist today, the POC principal and  
18 interest payments were, again, based on the current  
19 amortization schedules. The POC swaps payments were based on  
20 the existing swap schedule. The pension contributions and  
21 the health benefits for retirees would have come based on the  
22 assumptions that were provided to us by the city's actuaries.

23 Q Now, let me ask you about the substance of the meeting.

24 Did you make any part of the presentation that afternoon?

25 A I did.

1 Q What parts of the presentation did you make?

2 A I would have focused on pages 4 and 5 in terms of laying  
3 out what the financial position of the city was.

4 Q Were questions asked of you that day, that afternoon?

5 A I don't remember specific questions that afternoon.

6 Q Where were matters left at the end of the morning  
7 meeting?

8 A They were generally left to have an open dialogue and  
9 communication flow between the city's advisors and the  
10 participants in the meeting.

11 Q And at the end of the afternoon meeting?

12 A It was the same.

13 Q Let's look at the next exhibit, Exhibit 51. Can you tell  
14 us what Exhibit 51 is?

15 A Exhibit 51 is the ten-year plan in terms of the forecast  
16 that was available at that point of time as of June 21st.

17 Q Did you attend a meeting on June 25th with  
18 representatives of the bondholders?

19 A I did.

20 Q And where was that meeting held?

21 A That meeting was held in New York.

22 Q Who attended?

23 A It was bondholders and bond insurers and their financial  
24 advisors.

25 Q Was Exhibit 51 a document given to them that day?

1 A Yes. That was the document that we went through on that  
2 particular day.

3 Q Do you remember which bond insurers you met with or  
4 bondholders you met with on the 25th?

5 A Yes. Ambac was there. I think Assured was there.  
6 National, advisors from FGIC, advisors from Syncora. Those  
7 are actually some of the ones that I remember specifically.  
8 It was a pretty big meeting.

9 Q And I apologize if I asked you this. How long did you  
10 meet with them?

11 A We met with them for at least four to five hours.

12 Q What was the purpose of that meeting?

13 A The purpose of the meeting was to have a subsequent  
14 discussion and Q&A on the assumptions behind the information  
15 that was shared as of June 20th.

16 Q Do you remember any questions you were asked?

17 A There were a lot of questions with respect to the  
18 assumptions underlying the ten-year projections and the  
19 details in terms of how those numbers were built up.

20 Q And once again, where were matters left at the end of the  
21 June 25th meeting?

22 A They were left to have follow-up meetings on an  
23 individual basis with certain bondholders or the insurers to  
24 have more specific discussions around the business plan.

25 Q Let me direct your attention to July 9. Were there

1 meetings that day with bondholders or insurers for  
2 bondholders?

3 A Yes.

4 Q And where were those meetings?

5 A Those meetings were held in Detroit.

6 Q And did you attend them?

7 A Yes.

8 Q How long did they last?

9 A The morning meeting lasted about four or five hours.

10 Q And then I assume there was an afternoon meeting as well?

11 A Yeah. There was an afternoon meeting. My recollection  
12 is with the pension systems, I believe. There were a lot of  
13 meetings during this time frame.

14 Q How long was your meeting with the pension systems?

15 A I think we had a meeting for about two or three hours.

16 Q What was the purpose of the morning meeting?

17 A The morning meeting was generally to have additional  
18 dialogue and discussions around the assumptions of the  
19 business plan.

20 Q Do you remember who you met with in particular that  
21 morning?

22 A I remember it was the financial advisors for National.  
23 It was the financial advisors for FGIC, Assured were the some  
24 of the names that at least come to mind.

25 Q In this period, did the city, to your knowledge, make any

1 proposals to the bondholders to resolve their claims?

2 A The city made a proposal or a framework for a proposal in  
3 its June 14th presentation.

4 Q Did the bondholders at any point or any subgroup of  
5 bondholders make a proposal to the city at some point?

6 A My understanding is yes. I have not reviewed a proposal  
7 from the bondholders in detail.

8 Q Do you remember when that proposal was made?

9 A My recollection is it was prior to the city filing.

10 Q Okay. Now, in the afternoon meeting, what was the reason  
11 for meeting with the two pensions on the afternoon of July 9?

12 A It was to have additional discussions around the  
13 assumptions that the city's actuaries were using with respect  
14 to not only the size of the claim but also to ascertain the  
15 contribution levels required over the next ten years for the  
16 pension systems.

17 Q And I apologize if I've asked you this before. At the  
18 end of that afternoon meeting with the pensions, what was  
19 supposed to happen next, if anything?

20 A There was supposed to be a process to try and understand  
21 the assumptions, the actuarial assumptions, and thereby  
22 derive -- have an understanding of the amount of the claim  
23 and then have subsequent discussions around the amount of  
24 funding that the city may or may not be able to afford over the  
25 long term.

1 Q Okay. Now, let's now go to July 18.

2 THE COURT: Excuse me, Mr. Stewart.

3 MR. STEWART: Yes.

4 THE COURT: I'm sorry to be such a nuisance about  
5 this, but please try not to wander so far from the  
6 microphone.

7 MR. STEWART: Oh, sorry, Judge.

8 THE COURT: Part of our issue here is that we have  
9 overflow courtrooms where people are trying to hear what we  
10 say, so it's not just a question of the recording, which is  
11 important, but other people are listening in as well.

12 MR. STEWART: I'll do better, your Honor. Sorry.

13 BY MR. STEWART:

14 Q Let me direct your attention, if I could, now to July 18.  
15 Were you asked on or about July 18 to execute a declaration  
16 in connection with Detroit's bankruptcy filing?

17 A Yes, I was.

18 Q How many days before July 18 did you start working on  
19 your declaration?

20 A I don't recall the specific number of days. It was  
21 sometime in June. Late June is I think where we started it.

22 Q And do you -- how much of your declaration did you write,  
23 and how much of it was written by others for you?

24 A A majority of it -- of the declaration was written by me  
25 in conjunction with counsel.

1 Q Now, your declaration has a number of attachments to it,  
2 and I'm going to put them up before I question you about  
3 them. And let's start with Exhibit -- Attachment A, which is  
4 Exhibit 9. And is that one of the exhibits to your  
5 declaration?

6 A It is.

7 Q And is this a document you or someone else at E&Y  
8 prepared?

9 A Yes.

10 Q And what is it?

11 MR. RUEGGER: Your Honor, objection. We objected to  
12 this document. It is forecasts, which we think would require  
13 expert testimony. We believe any testimony related to it  
14 should be excluded on that grounds.

15 THE COURT: The document is in evidence?

16 MR. RUEGGER: No, your Honor.

17 THE COURT: It's not?

18 MR. STEWART: It's not, Judge. I'm going to ask him  
19 now about his dealings with Mr. Orr on the document; however,  
20 we also designated this document and the next two as  
21 summaries under Federal Rule of Evidence 1006 since they  
22 accumulate voluminous evidence which we made available to the  
23 objectors.

24 THE COURT: What does this document purport to do or  
25 to be without telling me what its contents are?

1           THE WITNESS: It was meant to be to show the two  
2 years of actual cash activity for the general fund and what  
3 the city's cash position was at the end of fiscal year 2013  
4 and fiscal year 2012, the magnitude of the deferrals over  
5 that time frame, your Honor, and then the two-year forecast  
6 beyond that time frame.

7           THE COURT: And so how was the document compiled?

8           THE WITNESS: Your Honor, the actuals for the first  
9 two years were compiled based on the receipts and  
10 disbursements activity that we were able to ascertain for the  
11 bank accounts. Your Honor, for the next two years, with  
12 respect to the different line items, I can walk through the  
13 assumptions, but --

14          THE COURT: By "the next two years," you mean fiscal  
15 year '14 and '15?

16          THE WITNESS: That is right, your Honor.

17          THE COURT: No need. I'll admit the document as to  
18 actual and preliminary for 2012 and 2013, but the objection  
19 is sustained as to the forecasts.

20          MR. STEWART: Thank you, your Honor.

21          (Debtor's Exhibit 9 received at 4:33 p.m.)

22 BY MR. STEWART:

23 Q Is this a document you discussed with the emergency  
24 manager or his advisors, Mr. Malhotra, on or before the date  
25 you executed your declaration?



1 A Yes.

2 Q And why did you discuss it with them?

3 A Because it showed the status of the city's liquidity  
4 position right around that time frame and in the subsequent  
5 few months.

6 Q And what did you say to the emergency manager or his  
7 advisors about the city's liquidity position at that time or  
8 in the coming periods?

9 A What I said is that the city's liquidity position at the  
10 end of fiscal year 2013 had improved by roughly \$40 million  
11 because the city did not make the POC payment that was due in  
12 June -- on June 15, 2013. And what I said is that over the  
13 next two years the city was going to have a significant cash  
14 burn for each particular year based on the disbursements  
15 significantly exceeding receipts.

16 Q What did you tell Mr. Orr --

17 THE COURT: Excuse me one second. Again, we have to  
18 clarify your language. You used the phrase P-O-C. What does  
19 that mean?

20 THE WITNESS: Your Honor, I was referring to the  
21 pension obligation certificate --

22 THE COURT: Okay.

23 THE WITNESS: -- and the payment that was due on  
24 June 15th.

25 THE COURT: And then you used the phrase "cash

1 burn." What does that refer to?

2 THE WITNESS: Your Honor, that refers to the city's  
3 operating disbursements exceeding its receipts or its --  
4 city's total disbursements exceeding its receipts thereby  
5 reducing the cash over a specified time frame.

6 BY MR. STEWART:

7 Q And so you've told us what you said to Mr. Orr. Did you  
8 tell him what the cash position was going to be at this rate  
9 in the coming years?

10 A Yes, I did.

11 Q And what did you tell him?

12 A I would have -- what I said is that the city's cash  
13 position net of deferrals could be approximately \$143 million  
14 negative at the end of fiscal year 2014 not making -- while  
15 not repaying any of the deferrals that had already been made  
16 as of that point of time or without unpooling any of the cash  
17 that the city had -- has currently pooled.

18 Q And if the city had unpooled the cash or paid up the  
19 deferrals, what did you tell him the cash position was going  
20 to be?

21 A What I said is that the city's cash position for -- would  
22 have been almost \$150 million worse off if the pension  
23 contributions that had been deferred till that time frame  
24 were made as well as if the deferred POC payment had been  
25 made. If the pooled cash had to be unpooled, that amount

1 would be roughly an additional \$90 million based on what was  
2 in the CAFR.

3 Q For a total cash shortfall of how much?

4 A Before the --

5 MR. DECHIARA: Objection.

6 THE WITNESS: -- unpooling of cash, it would --

7 MR. DECHIARA: Objection. Your Honor, I just am  
8 objecting to the extent that this -- what the witness is  
9 recounting he's saying to Mr. Orr, I just want to make clear  
10 that that's not coming into the record as the truth of the  
11 matter -- of the statements he's making to Mr. Orr. If  
12 that's clear, I have no objection, but the line is getting  
13 pretty blurred, and I think it's getting pretty close to the  
14 line.

15 THE COURT: I'm concerned about that. I share your  
16 concern. You used a phrase again that needs clarification,  
17 "unpool."

18 MR. STEWART: We were talking about the pooled  
19 funds, your Honor. Those were the --

20 THE COURT: I'm asking the witness.

21 MR. STEWART: Thanks.

22 THE COURT: What does "unpool the cash" mean?

23 THE WITNESS: Your Honor, what I was -- what I meant  
24 to say is if the pooled cash had to be restricted or  
25 segregated out of the general fund, that's what I was

1 referring to the unpooling of cash.

2 THE COURT: Okay.

3 BY MR. STEWART:

4 Q What did Mr. Orr say to you?

5 A On this particular document, the discussions with Mr. Orr  
6 or specifically also the other advisors was the magnitude --

7 MR. RUEGGER: Your Honor, I'm sorry to interrupt the  
8 witness, but I thought the question was what did Mr. -- what  
9 was the conversation with Mr. Orr.

10 MR. STEWART: Or his advisors.

11 MR. RUEGGER: And I thought the witness was just  
12 describing a conversation that might not have been with  
13 Mr. Orr but might have been with the advisors. If I  
14 misheard, then I apologize.

15 MR. STEWART: I thought I said Mr. Orr or his  
16 advisors, but if not I'll reask the question.

17 MR. RUEGGER: Thank you.

18 THE COURT: Okay.

19 BY MR. STEWART:

20 Q What did Mr. Orr or his advisors say to you?

21 A The specific discussions on this particular page were  
22 around the magnitude of the city's cash disbursements  
23 exceeding its cash receipts in terms of how dire the  
24 situation was with respect to the general fund's cash  
25 position.

1 Q Page 2 of our exhibit is -- let's put it up there, and  
2 let me ask you just what this is.

3 MR. RUEGGER: Your Honor, objection. It's a  
4 forecast. I'd rather not have any testimony on this.

5 THE COURT: I'm sorry. Did you say you'd rather not  
6 have any testimony about it?

7 MR. RUEGGER: And I'll rephrase my objection with  
8 all due respect, your Honor. Objection. It's a forecast,  
9 your Honor.

10 MR. STEWART: My question is what is this document?

11 THE COURT: Yeah. I think we can get at least that  
12 much in.

13 MR. STEWART: Yeah.

14 BY MR. STEWART:

15 Q What is this document?

16 A It's the monthly cash flow forecast for fiscal year 2014  
17 under base case.

18 THE COURT: I'm sorry. Under what?

19 THE WITNESS: Under base case.

20 THE COURT: Base case, which means --

21 THE WITNESS: So, your Honor, on this it means the  
22 city continuing to make its payments for both all unsecured  
23 claims per schedule and no restructuring initiatives such as  
24 any benefits from the bankruptcy protection may avail. It  
25 was the city paying its payments as they came due based on

1 the information that we had, including information from the  
2 actuaries.

3 THE COURT: Like steady state before?

4 THE WITNESS: That is correct, your Honor.

5 BY MR. STEWART:

6 Q And did you discuss your conclusions with Mr. Orr or his  
7 advisors?

8 A Yes.

9 Q Let's put up the next exhibit, 10, for identification.  
10 Mr. Malhotra, I think we have Exhibit 10 for identification,  
11 which is Exhibit B to your declaration. Is this a ten-year  
12 financial projection?

13 A Yes, it is.

14 Q Did you discuss this with Mr. Orr or his advisors?

15 A Yes, I did.

16 Q And what did you say to him, and what did he say to you  
17 or his advisors say to you about the ten-year projections?

18 A What the --

19 MR. RUEGGER: Objection. Your Honor, this is the  
20 same issue that Mr. DeChiara raised. A discussion of  
21 forecasts is essentially I think a back door around your  
22 ruling, so we'd object to the question and the answer.

23 THE COURT: Well, I'll permit the witness to answer  
24 this question with the understanding that the document is not  
25 in evidence and the witness' testimony about what the

1 document says is only for the purpose of the truth of what he  
2 told Mr. Orr, not for the truth of the statements themselves.

3 MR. RUEGGER: Thank you, your Honor.

4 BY MR. STEWART:

5 Q And what did you say to Mr. Orr about the conclusions you  
6 had reached in the document?

7 A What I said is that the city's revenues over the ten  
8 years, approximately \$10-1/2 billion, and the city's  
9 operating expenditures over these next ten years,  
10 approximately \$7-1/2 billion, for roughly a \$3 billion  
11 operating surplus. What I said specifically around the  
12 legacy liabilities was based on the current amortization  
13 schedule and the information that we have received from the  
14 actuaries, the legacy costs could be in excess \$7 billion  
15 over the ten years, which would result in a potential  
16 operating -- a potential deficit to the tune of \$4 billion  
17 over the next ten years.

18 MR. STEWART: Let's put up Exhibit 11 if we could.

19 BY MR. STEWART:

20 Q Can you tell us what Exhibit 11 is?

21 A Exhibit 11 is the five years of actual legacy  
22 expenditures and five years of a forecast on the scheduled  
23 debt service as it exists today or the pension and health --  
24 retiree healthcare information we received from the  
25 actuaries.

1 MR. STEWART: Let's blow up, if we could, the part  
2 that deals with the fiscal years ended between 2008 and 2012.

3 BY MR. STEWART:

4 Q Are those numbers numbers relating to years that had  
5 already -- where the books had already been closed?

6 A That is correct.

7 Q Where did your numbers come from?

8 A The numbers would have come from -- for the debt service,  
9 the POC's, would have come from the city. The pension  
10 contributions and the health benefits, the retirees -- for  
11 the retirees would have also come from the city in  
12 conjunction with the city's actuaries on the allocation of  
13 what was for public safety versus nonpublic safety or DDOT.

14 MR. STEWART: Your Honor, I would move this portion  
15 of the document into evidence since it reflects only  
16 historical data.

17 THE COURT: Any objections? All right. The Court  
18 will admit this document. What was the exhibit number again  
19 just so we're clear?

20 MR. STEWART: 11, I believe, Judge.

21 THE COURT: All right. Admitted Exhibit 11, 2008  
22 through '12 only.

23 (Debtor's Exhibit 11 received at 4:45 p.m.)

24 BY MR. STEWART:

25 Q And then go back to the full document if you could, and



1 as to the overall document, Mr. Malhotra, did you have  
2 discussions with the emergency manager or his advisors about  
3 it?

4 A Yes, I did.

5 Q And why did you discuss it with them?

6 A We discussed it in the context of the legacy expenditures  
7 continuing to have an increasing percentage of the overall  
8 general fund revenues compared to where the city was five  
9 years ago, compared to where the city was headed by 2017,  
10 that the weight of the legacy expenditures was almost going  
11 to close to double based on the projections that we had been  
12 given.

13 Q And what did the -- Mr. Orr or his advisors say to you in  
14 response to the points that you made?

15 A Specifically, they were surprised in terms of the  
16 magnitude of the increase in pension and retiree healthcare  
17 costs over the next five years.

18 MR. DECHIARA: Objection. Lack of foundation.  
19 Testifying to the state of mind of the --

20 THE COURT: It actually wasn't the question. The  
21 question was what did they say.

22 THE WITNESS: They basically said that the costs  
23 going up from where they were five years ago to where they  
24 were ten years ago -- I specifically remember that it was  
25 almost going to double -- was the response that I got back on

1 this particular page.

2 THE COURT: Okay. Can you try to specify for us  
3 when these conversations were that Mr. Stewart has been  
4 asking you about?

5 THE WITNESS: Sure. On this particular document we  
6 would have had -- which was also as a part of the June 14th  
7 proposal, your Honor, so we would have had meetings with  
8 Mr. Orr and the other advisors all through the June time  
9 frame and even in some of the May time frame, so there were a  
10 series of meetings that we had.

11 THE COURT: At which these documents were discussed?

12 THE WITNESS: Yes. The June 14th proposal, your  
13 Honor, was pulled together over a period of time, so there  
14 were specific documents that were discussed in those  
15 meetings.

16 MR. STEWART: Your Honor, I have a demonstrative  
17 exhibit I would like to use, but before putting it up on the  
18 screen, since there have been objections, it's Exhibit 38.  
19 Why don't we put it up on the screen? Judge, this is a  
20 graphic representation of what the witness already has  
21 testified to that he told Mr. Orr was the city's cash  
22 position as the witness had seen it, and what I would like to  
23 ask the witness is does this represent what you told Mr. Orr  
24 or his advisors about what you believe the city's cash  
25 position was going to look like in the coming year?

1           MR. RUEGGER: Objection. Leading, and it's also a  
2 forecast.

3           MR. STEWART: I can ask it in a nonleading way,  
4 Judge, but --

5           MR. RUEGGER: Then just forecast.

6           THE COURT: Yeah. You can fix the question. No.  
7 The objection is sustained.

8           MR. STEWART: Okay. Now, your Honor, as to these  
9 last three exhibits and actually also this chart, I'd like to  
10 move them into evidence on another ground. And as I  
11 mentioned, we identified these to the objectors as documents  
12 that qualified as summaries over Federal -- under Federal  
13 Rule of Evidence 1006. In other words, they compiled and  
14 pulled together voluminous records that could not  
15 conveniently or easily otherwise be made into proofs. That  
16 was done with proper notice. As the rule requires, we  
17 notified the objectors of this. We told them we have the  
18 underlying records available for your examination. If you  
19 wish to see them, please come and do so. One person did call  
20 to say they'd like to see them but never, in fact, came. I  
21 would submit that we have actually satisfied the requirements  
22 of Rule 1006 by doing this and that as simple summaries of  
23 voluminous information they qualify for admission.

24           MR. RUEGGER: Your Honor, I think Mr. Stewart  
25 misunderstands our objection. It's not that there's a lot of

1 data underlying any of these documents. That might very well  
2 be, but they are forecasts, which require, in our view,  
3 expert testimony, which is not in the courtroom, so we're not  
4 objecting due to the volume of the underlying data. It's  
5 because they are forecasts.

6 THE COURT: I do agree with that. The motion is  
7 denied.

8 MR. STEWART: Well, your Honor, could I be heard  
9 just one more --

10 THE COURT: All right.

11 MR. STEWART: -- one more moment on this? The fact  
12 they are forecasts doesn't, per se, change anything. They  
13 would have to be opinions before they're excludable. It's  
14 been testified he --

15 THE COURT: But why isn't the forecast an opinion  
16 about what's being forecast?

17 MR. STEWART: Well, it's possible to have forecasts  
18 that are factual, that are extrapolations, that are not  
19 really opinions, and there are forecasts rendered many times  
20 that don't involve experts. In fact, the two decisions I  
21 cited earlier involved financial analysts much like  
22 Mr. Malhotra who pulled together documents from which then  
23 conclusions could be reached about the probability of  
24 something happening or not happening. The fact --

25 THE COURT: They involve forecasts?

1 MR. STEWART: These did not.

2 THE COURT: Financial forecasts?

3 MR. STEWART: These involved complicated personal  
4 financial records, but they did involve an ultimate issue  
5 such as could this person have possibly afforded this item  
6 based on his or her income or --

7 THE COURT: In the past.

8 MR. STEWART: Well, it's past, but if a forecast is  
9 based on information that is either historical or is made  
10 available as information about a forecast --

11 THE COURT: I have to say I'm not persuaded, but if  
12 you can find me a case which says that a forecast does not  
13 involve expertise, I'll certainly consider it.

14 MR. STEWART: Okay, your Honor. We will do that.

15 THE COURT: We'll leave it open to that extent.

16 MR. STEWART: Thank you. That's all I have of this  
17 witness, your Honor.

18 THE COURT: All right. Well, we won't press on with  
19 cross-examination now. We will break for the day and  
20 reconvene at nine o'clock tomorrow morning. Before we go --  
21 ah, Ms. Patek has something, and then I have something.

22 MS. PATEK: Your Honor, this is just a brief  
23 housekeeping matter about a matter of a summary exhibit that  
24 came in at the beginning of the day, and this was something  
25 Mr. Irwin and I had talked about, and there was an error on

1 it. It was to be corrected, and it didn't get corrected, but  
2 it's going to be corrected on the --

3 THE COURT: All right. Let me ask the two of you to  
4 consult about that and get back to me first thing in the  
5 morning. I have been asked to remind you that although this  
6 courtroom will be locked overnight, there may and probably  
7 will be people in here doing what they regularly do, the IT  
8 staff, court staff, cleaning staff, so you are free to leave  
9 your equipment and property here with that understanding or,  
10 of course, you can take it with you. And I remind you once  
11 again please be quiet, perfectly quiet in the hallways. And  
12 we'll reconvene at nine o'clock tomorrow morning.

13 THE CLERK: All rise. Court is adjourned.

14 (Proceedings concluded at 4:53 p.m.)

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I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

October 27, 2013

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Lois Garrett